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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD J. TRUMP, *et al.*,

Appellants,

v.

RODERICK CHU, Individually and as Commissioner of the New York State Tax Commission

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

New York imposes a special Ten Percent Tax on gains derived from the transfer of real property within the State for a gross consideration of $1 million or more. For purposes of determining whether the consideration for a transfer is $1 million or more, the statute considers partial or successive transfers pursuant to a cooperative or condominium plan to be a single transfer of property. However, successive sales of a subdivided parcel of real property are considered to be separate transfers.

The questions presented are:

1. Whether the application of the Ten Percent Tax on the basis of gross consideration arbitrarily discriminates against transfers of real property of $1 million or more, in violation of the Equal Protection Clause of the United States Constitution.

2. Whether the Ten Percent Tax arbitrarily discriminates against developers of cooperatives or condominiums by requiring only such developers to aggregate the gross consideration received on partial or successive transfers, in violation of the Equal Protection Clause of the United States Constitution.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, County of New York (App. B, *infra*, 14a-19a) is not yet officially reported. The opinion of the New York Court of Appeals (App. A, *infra*, 1a-13a) is not yet officially reported.

JURISDICTION

The Supreme Court of the State of New York issued its memorandum decision on March 6, 1984, and entered an order dismissing the complaint on April 16, 1984 (App. B, *infra*,

14a-19a). The Court of Appeals of the State of New York issued its opinion and judgment on April 30, 1985 (App. A, *infra*, 1a-13a).

A notice of appeal was filed in the New York Court of Appeals on May 24, 1985 (App. C, *infra*, 20a-21a). The jurisdiction of this Court rests on 28 U.S.C. 1257(2), which authorizes an appeal to this Court from a final judgment rendered by the highest court of a State in which a decision could be had where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Section 1:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

The pertinent provisions of Article 31-B of the New York Tax Law are set forth in App. D, *infra*, 22a-44a.

STATEMENT

1. Article 31-B of the New York State Tax Law, enacted on March 28, 1983, imposed a new ten percent tax on gains (hereinafter the "Ten Percent Tax") derived from the transfer of real property within New York State. Tax Law §1441, App. A, *infra*, 25a. Although the tax does not apply to transfers where the consideration is less than $1 million (*id.* §1443(1), App. D, *infra*, 26a), it taxes gains from all other transfers from "dollar one." For purposes of determining whether the consideration for a transfer is for $1 million or more, the statute considers partial or successive transfers pursuant to a cooperative or condominium plan to constitute a single transfer of property, but provides that sales of a subdivided parcel of real property are considered to be separate transfers. *Id.* §1440(7), App. D, *infra*, 24a-25a.

Appellants are real estate developers doing business in the State of New York. Appellant Trump holds a beneficial interest in a joint venture known as the Trump-Equitable Fifth Avenue Company, the developer of the Trump Tower in Manhattan. The

38 floors of Trump Tower house 266 residential units that are presently being sold pursuant to a condominium plan for a projected gross revenue of $277 million. Since the passage of the Ten Percent Tax, Trump-Equitable has sold a substantial number of units in Trump Tower and, as transferor, has paid the tax under protest.[1]

Appellants brought this action in the Supreme Court of the State of New York seeking a judgment declaring that the Ten Percent Tax violates the Equal Protection Clause of the United States Constitution, and an order enjoining its enforcement and application. Appellants' challenge presented two equal protection claims. First, because the statute entirely exempts transfers of real property for a gross consideration of less than $1 million without regard to the amount of gain, appellants argued that the Ten Percent Tax unconstitutionally discriminates against transfers for $1 million or more. Second, because the statute aggregates the consideration on sales of cooperative and condominium residences, but not upon sales of subdivided parcels, appellants urged that the Ten Percent Tax unconstitutionally discriminates against developers of cooperative and condominium residences (App. A, *infra*, 3a).

The Supreme Court of the State of New York, New York County, sitting in Special Term, upheld the Ten Percent Tax (App. B, *infra*, 15a-19a). In addressing appellants' equal protection claim that the Ten Percent Tax unconstitutionally discriminates against transferors of property for $1 million or more, the court recognized that transfers of property for less than $1 million may generate a larger gain than transfers in excess of $1 million. While the court conceded that this method of taxation "must result in some inequalities" (*id.* at 17a), it nevertheless concluded that "the equal protection clause does not prevent a state from taxing competitive advantages . . . [so] that the state

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[1] Appellant Richard Pellicane is a real estate developer in Suffolk County who is the owner of several parcels of real property in that county that are subject to the Ten Percent Tax. He brought a similar action in the Supreme Court of New York, Suffolk County, which was consolidated with appellant Trump's action in New York County (App. A, *infra*, 3a).

may, as it has done, tax large reality [sic] developers without taxing small developers" (*ibid.*).

Addressing appellants' equal protection claim that the statute discriminates against condominium and cooperative developers, the court stated that the legislative history is entirely silent. Accordingly, the court admitted that it "[did] not know what prompted the Legislature" to favor developers who build and sell separate housing at the expense of cooperative and condominium developers (App. A, *infra*, 18a). It accepted, however, as "plausible," three reasons offered by the State in attempted justification for the distinction. They are: (1) that the legislature "intended to benefit the private home building industry"; (2) that the legislature intended to tax apartment developers "because of the increased public services necessary in urban areas"; and (3) that the legislature's purpose was to "reduce the difficulty in collecting taxes from transferors of condominiums and cooperatives" (*ibid.*).

Moreover, the court, *sua sponte*, proposed its own "rational bases" for the distinction. It first referred to the legislature's supposed desire to benefit the private home industry since it involves the creation of new housing rather than the conversion of previously existing apartment buildings. Second, the court relied upon the close state regulation of cooperatives and condominiums as a further basis for the statutory discrimination against developers of such real estate (*id.* at 18a-19a).

2. The New York Court of Appeals affirmed, with one judge dissenting (App. A, *infra*, 1a-13a). Like the trial court, the Court of Appeals recognized that the $1 million exemption might result in inequalities in which large amounts of gain would go untaxed (see *id.* at 3a-4a). It held, however, that the legislature "rationally could believe that 'generally speaking' profits increase as the amount of gross consideration received increases . . . " (*id.* at 7a). Accordingly, the Court of Appeals held that the Ten Percent Tax did not run afoul of this Court's ruling in *Stewart Dry Goods v. Lewis*, 294 U.S. 550 (1935), invalidating a graduated gross receipts tax that did not take into account the taxpayer's profit or loss but instead increased the rate of tax in accordance with increases in total gross receipts.

The Court of Appeals likewise rejected appellants' equal protection claim that the statute discriminated against cooperative and condominium developers. Despite the undisputed fact that the Ten Percent Tax was simply designed as a revenue measure, the Court of Appeals ascribed various regulatory goals to the legislature and improvised four justifications for the preference favoring developers of subdivided realty in somewhat different terms than the court of first instance. In the Court of Appeals' view, the discrimination against cooperative and condominium developers was warranted because condominium and cooperative developments purportedly require more costly state regulations, and are more likely to be located in urban areas where there are greater demands on public services. The Court also believed that the Ten Percent Tax would be more costly to administer if condominium and cooperative units could be treated as separate tax transactions. Finally, the Court stated that the legislature could have believed that the discrimination against condominium and cooperative developers would encourage the development of individually-owned residences and discourage the conversion of rental apartments to condominiums and cooperatives (*id.* at 7a-8a).

The dissenting judge argued that the $1 million exemption invalidated the tax under the Equal Protection Clause because it has no relation to the purpose of the tax. If, as the State claims, the tax is a tax on profits, the dissent reasoned that the State cannot constitutionally treat similarly situated sellers of real property differently. As a result, he concluded that the effect of the $1 million exemption is that "those with large profits may escape the tax, while those in a so-called weak position may have to pay" (*id.* at 11a). Moreover, the dissent pointed out that by excluding various selling expenses from the determination of "original purchase price" (Tax Law §1440[5], App. D, *infra*, 23a), the statute taxes much more than economic gain from a transfer of real estate. Accordingly, the dissent concluded that the Ten Percent Tax is invalid under the rationale of this Court's decision in *Stewart Dry Goods v. Lewis, supra* (*ibid.*).

Finally the dissent took issue with the majority's attempted justification of the disparate tax treatment of condominium and cooperative developers on the one hand, and developers of subdivided residential realty on the other. In his view, the statutory discrimination was "equally offensive" under the rational-basis test (*id.* at 12a). As the dissent recognized, "Condominium and cooperative developments are not peculiar to urban areas.... The indiscriminate classification between developers of condominium and cooperative dwellings, and developers of subdivided parcels with improved residences, lacks any rational basis in law or in logic" [citation omitted] (*ibid.*).

THE QUESTIONS ARE SUBSTANTIAL

In upholding New York's Ten Percent Tax on gains from the transfer of interests in realty, the decision of the New York Court of Appeals conflicts with this Court's ruling more than a half century ago in *Stewart Dry Goods Co. v. Lewis, supra,* 294 U.S. 550. There, the Court struck down, on equal protection grounds, a Kentucky graduated gross receipts tax on retail merchants, where the statute classified merchants solely according to the volume of sales. Like the Ten Percent Tax, the tax at issue in *Stewart Dry Goods* was "essentially a revenue measure" (*id.* at 555), but that did not save it from invalidity.

Although the Ten Percent Tax is nominally directed at gains, its imposition — like the tax in *Stewart Dry Goods* — depends entirely upon gross receipts, *viz.*, whether the gross consideration for the transfer is $1 million or more. But, as we shall show, the $1 million cutoff figure is entirely arbitrary, and bears no correlation whatsoever to the amount of gain. Hence, the effect of the $1 million cutoff is to treat similarly situated taxpayers differently on the basis of their gross receipts. *Stewart Dry Goods* teaches that such discriminatory taxation cannot pass muster under the Equal Protection Clause.

Moreover, by aggregating partial or successive transfers pursuant to a condominium or cooperative plan for purposes of determining whether they exceed the $1 million cutoff figure, but not aggregating the separate sales of subdivided real property for such purpose, the Ten Percent Tax wrongfully discriminates

against cooperative and condominium developers. It is undisputed that the legislative history of the measure discloses only that the purpose of the Ten Percent Tax was to raise revenue, and is otherwise silent. Nevertheless, the Court below ascribed to the legislature various regulatory goals in an attempt to justify the discrimination against cooperative and condominium developers. But the statutory discrimination is not rationally related to any of the court's hypothesized legislative goals, proferred after the fact by the State's attorneys. Accordingly, the statute violates the Equal Protection Clause under the rational-basis test established by the decisions of this Court.

Finally, since its enactment in March, 1983, the Ten Percent Tax has imposed an onerous financial burden upon real estate developers in New York. Recent estimates show that the tax has raised more than $300 million per year. Hence, the questions presented arise in the context of a levy of enormous fiscal significance. This Court should note probable jurisdiction and confirm that the Ten Percent Tax is incompatible with the guarantees of the Equal Protection Clause of the Fourteenth Amendment.

1 (a). The principal distinction drawn by the Ten Percent Tax is the absolute exemption of transfers for a consideration of less than $1 million. Simply put, gains on transfers for $1 million or more are taxed in their entirety at ten percent, while gains on sales below $1 million entirely escape the tax. Thus, the gross consideration for transfers of realty is the critical factor in determining whether the tax will be imposed.

Because the imposition of the Ten Percent Tax depends upon the gross consideration for the transfer, the statute cannot be reconciled with this Court's decision in *Stewart Dry Goods Co. v. Lewis, supra,* 294 U.S. 550. There, the Court struck down a Kentucky gross receipts tax on retail merchants which was graduated, and which classified merchants solely according to the

volume of their sales. Like the Ten Percent Tax, the Court characterized the Kentucky levy as a revenue measure.[2]

The vitality of *Stewart Dry Goods* has never been questioned by this Court. Indeed, during the very next Term in *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U.S. 32 (1936), the Court explicitly followed its *Stewart Dry Goods* ruling, and held that an Iowa statute imposing a tax based on gross receipts from sales according to an accumulative graduated scale created an arbitrary discrimination and was therefore invalid under the Equal Protection Clause.[3] Like the taxes that were held unconstitutional in those cases, the Ten Percent Tax bears no rational relation to the subject matter to be taxed or to the capacity to pay. Although the statute is nominally styled a tax on "gains", it is triggered in the first instance by the amount of the gross consideration for the transfer.

That there is no logical or economic correlation between the amount of consideration and the net gain on the sale of realty is best illustrated by the following example. A, an investor whose original purchase price for an interest in realty is $500,000, sells the property for $990,000, realizing a $490,000 gain. This gain is entirely exempt from the Ten Percent Tax because the consideration for the transfer was less than $1 million. In contrast, B has inherited property which has an original purchase price of $990,000. He sells it for $1,010,000. The tax applies and B is subject to a tax of $2,000 — 10% of the entire $20,000 ($1,010,000 less $990,000) gain. Transferor C, a developer whose cost basis in a parcel of realty is $600,000, sells the property for $1,090,000 realizing a $490,000 gain. His 10% tax is $49,000.

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[2] The Kentucky tax was one-twentieth of one percent on the first $400,000 of annual gross sales, and the rate increased on each additional $100,000 of sales between $400,000 and $1,000,000 inclusive. Sales over $1,000,000 were taxed at the rate of one percent. The increased tax rates applied only to sales in each successive bracket. (See 294 U.S. at 554.)

[3] The *Stewart Dry Goods* principle has been applied by the state courts as well. See *Kalian v. Langton*, 96 R.I. 367, 192 A. 2d 12 (1963); *Merit Oil Co. v. New York State Tax Commission*, 111 Misc. 2d 118 (Sup. Ct. Albany Co. 1981).

Thus, under the statute, transferors are classified on the basis of the gross receipts paid for their properties without regard to the gain realized. On the basis of an irrational line, arbitrarily drawn at $1 million of gross receipts, transferors are either entirely exempt from the burden of the Ten Percent Tax, or are assessed from "dollar one." In the example, A would accordingly have no tax liability, although his profit is almost 25 times greater than B's profit (who pays a small tax). Moreover, A's tax exempt profit is the same as that of C, who pays a substantial tax.

As the foregoing examples make plain, the State has enacted a gross receipts tax in the guise of a gains tax. Surely it cannot claim that this Ten Percent levy is a gains tax when it leaves substantial gains untaxed merely on the basis of gross receipts. While the State could have fashioned the tax on the basis of gains rather than gross receipts, it did not do so. And therein lies its fundamental constitutional defect. As the dissenting judge succinctly observed, "No one would deny the power of the Legislature to enact a 10% capital gain surcharge on every taxable transfer of real property in the State, but when such a tax statute arbitrarily treats similarly situated sellers of real property differently, in a discriminatory manner without rational basis to support the disparate treatment, it runs afoul of the equal protection clause" (*id.* at 10a).

(b). Although the court below acknowledged that the Ten Percent Tax imposed markedly unequal burdens upon similarly-situated taxpayers (see App. A, *infra*, 3a–4a), it concluded that "[t]his case is distinguishable from *Stewart Dry Goods* . . . because although liability for the tax . . . is determined by the amount of gross consideration, the actual calculation of the tax due depends entirely on the gain realized from the real property transfer" (*id.* at 6a).

But the very administration of the statute belies the court's characterization of the Ten Percent Tax as a tax on net gain. Indeed, the tax can be imposed even if there is no gain on a particular transfer because the statute does not permit the deduction of certain frequently incurred expenses in the determination of "gain" from real property transfers. Under the Regulations, a transferor cannot deduct so-called "soft" costs

such as advertising expenses, public relations costs, marketing costs, field office expenses, and costs for non-capital improvements made to put the property in marketable condition. *See* Regulations, Secs. 590.15, 590.16, 590.17, 590.39.[4] Surely, it cannot be denied that such costs can materially reduce, or even wipe out, the transferor's gain on a sale. The Ten Percent Tax, however, turns a blind eye to these basic facts of business life. Thus, under the so-called "gains" tax, when the transferor's selling costs equal or exceed the difference between the $1 million or more consideration for the transfer and the transferor's original purchase price, a tax will be imposed upon "gain" even though the transferor realizes no economic profit whatsoever.

Moreover, because the Ten Percent Tax is a levy imposed upon each discrete transaction, a transferor's losses incurred on particular transfers may not be used to offset gains on other transfers. The combined effect of the non-deductibility of such losses, the non-deductibility of many standard selling expenses, and the application of the tax on the basis of gross consideration render the Ten Percent Tax analytically equivalent to the gross receipts tax struck down by the Court in *Stewart Dry Goods*.[5] Thus, the mere fact that the Ten Percent Tax is called a tax on gains cannot save it from invalidity. For it is well settled that the critical inquiry under the Equal Protection Clause must focus on the nature and effect of the tax. *Stewart Dry Goods Co. v. Lewis*, *supra*, 294 U.S. at 555 and n.4. And, as the Court more recently reaffirmed, "[A]n unconstitutional tax is not made the less so by masking it in words cloaking its actual thrust". *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 113 (1975).

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[4] For the convenience of the Court, we are lodging a copy of the Ten Percent Tax Regulations with the Clerk.

[5] Indeed, the unconstitutionality of the Ten Percent Tax follows *a fortiori* from the result of *Stewart Dry Goods* because of the use of the arbitrary $1 million cut-off point rather than a graduated tax. At least in *Stewart Dry Goods*, each retailer paid the same tax on each $100,000 of gross receipts. Here, all transferors who sell property for not more than $1 million per sale *pay no tax at all*, whereas appellants and other transferors who make sales that exceed that figure are taxed on every dollar of their gain.

2. In attempting to justify the statutory $1 million cutoff, the court below hypothesized that "[t]he Legislature may establish the exemption at $1 million for at least two related reasons despite the inequalities that may result" (*id.* at 7a).

But the court's reasoning does not withstand analysis. First, the court stated that the legislature rationally could believe that profits increase in proportion to gross consideration. Although the court cited *Stewart Dry Goods* in support of its argument, that case unquestionably stands for precisely the opposite conclusion. In *Stewart Dry Goods*, this Court emphatically rejected the State's attempt to justify the graduated tax on the grounds that the retailers' profits and ability to pay the tax generally increased directly with the volume of sales and that recipients of greater gross receipts enjoyed a competitive advantage over retailers with lower volume of sales. In this respect, the Court stated: "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits . . ." (294 U.S. at 558). Thus, the assumption of the court below that there is a necessary correlation between gross sales and net profits is not only logically untenable but was long ago refuted by this Court in *Stewart Dry Goods*.

Secondly, the court below concluded that the Legislature could exclude sales below $1 million on the grounds of "administrative convenience". But if there is no correlation between gross receipts and net gains, there is likewise no basis for excluding sales below $1 million on the ground that they would yield little revenue when measured against the cost of collection. Indeed, this Court dismissed precisely the same argument in *Stewart Dry Goods* in holding that the requirements of the Equal Protection Clause cannot be cast aside in favor of purported administrative convenience. As the Court stated:

> We are told that the gross sales tax in question is in truth a rough and ready method of taxing gains under the guise of taxing sales; that it is less complicated and more convenient of administration than an income tax; and Kentucky for these reasons is at liberty to choose this form,

> and to ignore the consequent inequalities of burden in the interest of ease of administration. *The argument is in essence that it is difficult to be just, and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection.* [*Id.* at 559–560; emphasis supplied.]

In sum, like the tax struck down in *Stewart Dry Goods*, the operation of the $1 million exemption "is unjustifiably unequal, whimsical and arbitrary . . ." (*id.* at 557). It therefore cannot pass muster under the Equal Protection Clause.

3 (a). For purposes of determining whether the consideration for a transfer is $1 million or more, the Ten Percent Tax considers partial or successive transfers pursuant to a cooperative or condominium plan to constitute a single transfer of property. It provides, however, that the separate sales of a subdivided parcel of real property improved with residences are not a single transfer of property. As a result, developers of subdivided real property can avoid the Ten Percent Tax as long as each individual sale is for less than $1 million. Their counterparts engaged in condominium sales must aggregate the consideration derived from sales in a particular project. Hence, ten sales of ten $100,000 condominiums will trigger the tax while ten sales of ten $100,000 houses on subdivided parcels will not trigger the tax. This variant method of computing consideration wrongfully discriminates against developers of cooperatives and condominiums, in violation of the Equal Protection Clause.

It is settled that a legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). As the Court elaborated in *Johnson v. Robison*, 415 U.S. 361, 374-375 (1974):

> Our analysis of the classification proceeds on the basis that, although an individual's right to equal

> protection of the laws "does not deny . . . the power to treat different classes of persons in different ways[;] . . . [it denies] the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " [*Id.* at 374-375, quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), which in turn was quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (ellipses and brackets in original)]

To be sure, the Court has observed that in structuring internal taxation schedules "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation". *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). But it has also emphasized that the relevant rational-basis standard "is not a toothless one " (*Mathews v. Lucas*, 427 U.S. 495, 510 (1976)) and will not be satisfied by implausible justifications for the statutory classification, proferred after the fact by government attorneys. If, after considering the possible legislative justifications, the Court does not perceive any legitimate purpose that is furthered by the discriminatory classification, the statute cannot stand in the face of the Equal Protection Clause. *Zobel v. Williams*, 457 U.S. 55, 60-65 (1982). Indeed, as recently as last Term, the Court struck down two state tax statutes that contained classifications for which there were no plausible justifications. *Hooper v. Bernalillo County Assessor*, 53 U.S.L.W. 4827 (June 24, 1985); *Williams* v. *Vermont*, 53 U.S.L.W. 4659 (June 4, 1985).

(b) The classification between developers of subdivided realty and developers of cooperatives and condominiums cannot be justified on any rational basis. Each is involved in the business of

home development. If the common class is transferors of interests in real estate, then transferors of subdivided realty should be treated identically with transferors of cooperatives and condominiums. A dollar of consideration received by a detached home builder is the same as a dollar received by a developer of a cooperative apartment project for a single apartment. Both are separate sales and should be treated as such for purposes of the $1 million cut-off in the statute.

Here, the legislative history discloses only that the Ten Percent Tax is a revenue measure and is completely silent as to the reasons for the discriminatory treatment of condominium and cooperative developers. Nevertheless, the court below attributed various regulatory goals to the legislature, and improvised four justifications for the classification that were proposed after the fact by the State attorneys. However, none of the reasons proposed by the court are in fact plausible.

First, the court stated that condominium and cooperative developments "involve greater administrative cost to state government as a result of more extensive special laws, regulations and inquiries than apply to subdivided improved realty . . ." (App. A, *infra*, 8a).

But the very statute upon which the court relied, New York General Business Law §352-e, convincingly refutes the court's hypothesis. Pursuant to §352-e7(a), which was first enacted in 1960 long before the Ten Percent Tax, the Attorney General of New York is required to collect substantial fees for the filing of each offering statement or prospectus for a cooperative or condominium plan. In 1962, the legislature enacted a sliding fee scale based upon the value of the offering, up to a maximum of $10,000. When this sliding fee scale was originally enacted in 1962, the legislative history explicitly linked the filing fees with the regulatory costs incurred by the State. In this respect, the Chairman of the Senate Committee on Labor and Industry wrote to the Counsel to the Governor that the measure was "designed to relate the amount of the fees to be paid by the promoters directly to the additional cost of processing the technically involved documents requiring analysis in connection with a Sec.

352-e offering". See Memorandum of the Executive Chamber, N.Y. Governor's Bill Jacket, L.1962, c.57,7-8.

In addition, the statute requires the Attorney General to collect a filing fee of $75 for each amendment to an offering statement, and for each application granted for permission to solicit public interest or public funds preliminary to the filing of an offering. Such fee is creditable against the filing fee for an offering statement or against the equivalent fee schedule for a "no filing required" offering.[6] Although the Ten Percent Tax only covers sales of interests in realty in New York, the filing fees are payable for all public offerings "in or from the state of New York" (§352-e2). It is therefore plain that the Legislature intended the filing fees — and not the Ten Percent Tax, as the court below mistakenly believed — to be the toll charges designed to reimburse the State for whatever costs it may incur in regulating the sale of cooperatives and condominiums.[7]

What is more, the mere fact that New York regulates cooperative and condominium sales cannot, standing alone, justify a discriminatory tax against their developers, as the Special Term court erroneously concluded (App. B, *infra*, 19a). Legislation in other heavily regulated areas of commerce has nevertheless been struck down where the legislation has denied constitutional rights. Surely, no area of the economy is more

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[6] These filing fees were increased to their present level in 1981. See L. 1981, c. 163, Sec. 129, effective June 1, 1981, New York General Business Law §352-e, Historical Note (McKinney 1984). The legislative history states that the fees were increased "to bring charges in line with the costs . . ." See Memorandum of the Executive Chamber, N.Y. Governor's Bill Jacket, L. 1981, c.103.

[7] The legislature's intention that the filing fees reimburse the State for the regulatory costs incurred by the Attorney General is further confirmed by §352-e7(b), which provides that if the Attorney General requires an inspection to be made in connection with a cooperative or condominium offering of property situated outside New York State, he is required to collect from the developer a reasonable amount to reimburse the State for the cost of travel.

But gains from the sale of such out-of-state property are not subject to the Ten Percent Tax (see Tax Law §1441, App. D, *infra*, 25a). Hence, this travel cost reimbursement statute provides additional evidence that the Ten Percent Tax is not intended to reimburse the State for the cost of regulation of cooperatives and condominiums.

heavily regulated than the securities market. Yet in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), this Court unanimously struck down New York's transfer tax on securities (upheld by the court below) on the ground that it burdened out-of-state sales of securities, in violation of the Commerce Clause.

Second, the court below suggested that cooperative and condominium developments are more likely to occur in urban areas and make greater demands on urban services (App. A, *infra*, 8a). But as the dissent correctly pointed out, "Condominium and cooperative developments are not peculiar to urban areas. Indeed, cluster-type condominium development is encouraged for ecological as well as practical reasons . . ." (*id.* at 12a).

Third, the court below speculated that "treating sales of condominium and cooperative units as separate tax transactions would entail greater administrative costs than in the case of subdivided realty . . ." (*id.* at 8a). But such a statement displays a fundamental misapprehension as to the mechanics of collection of the Ten Percent Tax. As in the case of transfers of private homes, the statute prescribes that the recording officer will not accept the deed to a condominium apartment for registration unless it is accompanied by a statement of tentative assessment of the amount of tax that has been filed with the New York State Department of Taxation and Finance. See Tax Law §1447(e), App. D. *infra*, 31a. Thus, there is absolutely no difference between the cost of collection of the Ten Percent Tax from condominium developers and collection from subdividers of improved realty that could serve to justify the discrimination against the former class.

Finally, the court below concluded that the legislature could have believed that the classification "would encourage the development of individually-owned residences while at the same time discourage the rapid conversion of scarce rental apartments to condominiums and cooperatives" (*id.* at 8a). As for the court's initial point, condominiums and cooperatives are likewise individually-owned residences that occupy less land space. There is no basis for speculating that the legislature intended to

encourage one form of home ownership at the expense of the other.

Nor is the court's further observation with respect to the conversion of rental apartments adequate to explain or justify the discrimination worked by the tax. First, it is plain that many cooperative and condominium developments are created by the construction of new housing units, rather than the conversion of rental apartments.[8] Moreover, because nothing in the statute prevents a pass-through of tax costs to the buyer, there is no rational basis for hypothesizing a legislative "belief" that the Ten Percent Tax would moderate the conversion rate of rental apartments to cooperatives.[9]

In sum, none of the reasons proferred by the State, and accepted by the court below, are plausible justifications for the statutory discrimination against developers of cooperatives and condominiums. The deference shown by the court below is not to the considered judgment of the legislators but to the post-hoc arguments of litigators. Since the classification is unrelated to any expressed statutory purpose it cannot stand under the rational-basis test. This Court should apply this settled equal protection principle by reviewing, and reversing, the judgment below.

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[8] Trump Tower represents the construction of new housing units in the form of condominiums.

[9] The Special Term court of first instance relied upon a similarly implausible justification for the discrimination. (App. B, *infra*, 18a–19a.)

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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DATED: July 1985.

APPENDIX

APPENDIX A

State of New York

Court of Appeals

SupC No. 152

DONALD J. TRUMP, ET AL.,
Appellants,
v.
RODERICK CHU, individually and as Commissioner of the New York State Tax Commission,
Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(152)Milton Gould, NY City, for appellant Trump.
Roy M. Cohn, NY City, for appellant Pellicane.
Robert Abrams, Attorney General (Robert Hermann, Peter H. Schiff, Richard G. Liskov, & August L. Fietkau of counsel) for respondent.

SIMONS, J.

Plaintiffs Donald J. Trump and Richard Pellicane seek a judgment declaring that Article 31-B of the Tax Law, which imposes a ten percent tax on gains derived from real property transfers (see Tax Law §§ 1440 to 1449-c), violates the equal protection clause of both the United States Constitution (US Const, 14th Amend) and the New York State Constitution (NY Const, art I, § 11) and a permanent injunction prohibiting defendant Commissioner of the Department of Taxation and Finance from enforcing it. Special Term upheld the statute and plaintiffs are before us by direct appeal from its judgment (see NY Const, art VI, § 3[b][2]; CPLR 5601[b][2]). We affirm Special Term's holding but modify the judgment to declare that Article 31-B of the Tax Law (L 1983, ch 15, § 181) does not violate either the State or Federal Constitution (see *Lanza v Wagner*, 11 NY2d 317, 334).

Article 31-B was enacted in 1983 as part of a comprehensive package of tax measures designed to provide necessary revenues for the 1983-1984 State Budget (L 1983, ch 15). It imposes a tax of ten percent on gains derived from the transfer of real property within the state payable by the transferor (see Tax Law §§ 1441, 1442). The statute defines "gain" as "the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price" (*Id.* § 1440[3]). It also contains several exemptions from the tax, but for purposes of this appeal the only relevant exemption is for transfers in which the consideration is less than one million dollars (see *id.* § 1443[1]). In determining whether a transfer is for one million dollars or more, the statute provides different modes of treatment for condominiums or cooperatives sold by the developer, on the one hand, and subdivided parcels of real property improved with residences on the other. In the former situation, if the aggregate consideration to the developer for the sale of the entire development equals or exceeds one million dollars and there is a gain, the initial sale of any individual unit will be taxed on a proportionately allocated basis. When a developer sells a subdivided plot of land improved with individual residences, however, the price of the single residence is deemed the consideration for purposes of the one million dollar exemption (see *id.* § 1440[7]).[1]

Plaintiff Donald Trump is a real estate developer who holds a beneficial interest in a joint venture known as the Trump-Equitable Fifth Avenue Company, the developer of Trump

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[1]Section 1440(7) of the Tax Law provides:

"Transfer of real property shall also include partial or successive transfers pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property."

Tower in Manhattan. The thirty-eight floors of Trump Tower house 266 residential units that are being sold pursuant to a condominium plan for a projected gross revenue of $277 million. Since the passage of Article 31-B, Trump Equitable has sold several units in Trump Tower and, as transferor, has paid the ten percent gains tax imposed by that statute under protest. Plaintiff Richard Pellicane is a real estate developer in Suffolk County who is the fee owner of several parcels of real property in that county that are subject to the ten percent gains tax imposed by Article 31-B.

Plaintiff Trump instituted an action in Supreme Court, New York County and plaintiff Pellicane brought his action in Supreme Court, Suffolk County. Both plaintiffs asserted that the ten percent gains tax violates the equal protection clause of the Federal and State Constitutions in that it creates arbitrary and discriminatory classifications between: (1) transferors who sell their real property for one million dollars or more and those who sell property for less than one million dollars, (2) condominium/cooperative developers and developers of subdivided residential plots and (3) transferors of real property and transferors of other tangible and intangible property. In addition, plaintiff Pellicane alleged that the gains tax violates the due process clause of the United States and New York State Constitutions because it is a retrospective tax (see US Const, amend XIV; NY Const, art I, § 6). After answering, defendant moved to dismiss the Trump complaint and the Pellicane amended complaint for failure to state a cause of action and plaintiffs cross-moved for summary judgment. Plaintiffs' motion to consolidate the actions and remove the Pellicane action to Supreme Court, New York County was granted and the actions were consolidated. Special Term upheld the gains tax in its entirety, denied plaintiffs' cross motions for summary judgment and granted defendant's motion to dismiss.

On this appeal, plaintiffs raise two equal protection challenges to the constitutionality of the gains tax. First, they assert that by exempting transfers for less than one million dollars the gains

tax treats identically situated taxpayers differently on the basis of varying levels of gross receipts, e.g., a taxpayer who sells his property for $999,999 and has a gain of $500,000 owes no tax whereas a taxpayer who sells his property for $1,000,001 and has a similar $500,000 gain must pay a tax of $50,000. Thus, plaintiffs allege that the gains tax is indistinguishable from gross receipts taxes that have been declared unconstitutional based upon findings that the gross receipts have no rational correlation to the amount of the gain. Second, plaintiffs contend that by requiring the aggregation of consideration in connection with the sale of condominium and cooperative dwellings for purposes of meeting the one million dollar taxing threshold, but not for the sale of subdivided parcels with improved residences, the gains tax unconstitutionally discriminates against developers of condominiums and cooperative dwellings.

The scope of our review is narrow. Taxing statutes, like other social and economic legislation that neither classify on the basis of a suspect class nor impair a fundamental right, must be upheld if the challenged classification is rationally related to achievement of a legitimate state purpose (*Western & Southern Life Ins. Co. v State Board of Equalization*, 451 US 648, 657). Moreover, the statute enjoys a presumption of constitutionality which "can be overcome only by the most explicit demonstration that [the] classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it" (*Madden v Kentucky*, 309 US 83, 88 [footnotes omitted]; see *Maresca v Cuomo*, 64 NY2d 242, 250; *Allied Stores of Ohio v Bowers*, 358 US 522, 527-528). When examining classification, it should be remembered that in the field of taxation the Legislature is "not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value" (*Allied Stores of Ohio v Bowers*, *supra*, p 527) but rather it has "large leeway in making classifications and drawing lines which in [its] judgment produce[s] reasonable systems of taxation" (*Lehnhausen v Lake Shore Auto Parts Co.*, 410 US

356, 359; *Shapiro v City of New York*, 32 NY2d 96, 103). Thus, the equal protection clause does not prevent state legislatures from drawing lines that treat one class of individuals or entities differently from other unless the difference in treatment is "palpably arbitrary" or amounts to an "invidious discrimination" (see *Lehnhausen v Lake Shore Auto Parts Co.*, *supra*, p 360; *Allied Stores of Ohio v Bowers*, *supra*, p 527; *Shapiro v City of New York*, *supra*, p 103).

Addressing the discriminatory effect of the exemption for transfers of real property for less than one million dollars, plaintiffs contend that our decision is controlled by *Stewart Dry Goods Co. v Lewis* (294 US 550; see also *Merit Oil of New York, Inc. v New York State Tax Commn.*, 111 Misc 2d 118). In *Stewart Dry Goods*, the United States Supreme Court invalidated a graduated gross receipts tax imposed on the sale of retail merchandise because the rate of tax increased as the total gross receipts of sales increased. The statute taxed similar transactions differently, therefore, depending on the amount of receipts obtained from previous transactions.[2] The only conceivable justification for this different treatment was that a merchant's net income and consequently his ability to pay the tax increased as his volume of sales increased (*Id.* at 557-558). The court held this was not a rational basis for the tax because the gross receipts tax was imposed regardless of whether a merchant made a profit. Thus, merchants with a large volume of business but an actual net loss paid more tax than a low volume merchant with a substantial profit (*Id.* at 560-561). Similarly, the statute at issue in *Merit Oil* imposed a two percent gross receipts tax on all companies engaged in importing, extracting, producing, refining, manufacturing,

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[2] The rate of tax for the first $400,000 of annual sales was 1/20th of one percent. The rate increased on each additional $100,000 of sales between $400,000 and $1,000,000. On all sales over $1,000,000 the rate was one percent. The higher rate of tax applied only to the gross receipts in excess of the preceding bracket (see *Stewart Dry Goods Co. v Lewis*, 294 US 550, 554, *supra*). Thus, the sale of a radio, say, for $50 at the beginning of the year was taxed at 1/20th of one percent but the sale of an identical $50 radio after $1,000,000 in previous sales would be taxed at the rate of one percent.

compounding or selling petroleum but granted retailers who sold not more than 60,000,000 gallons of petroleum during the preceding taxable year a total exemption (former Tax Law § 182[2][a], as added by L 1980, ch 271, § 3). Special Term, relying exclusively on *Stewart Dry Goods*, found this classification of retailers violated equal protection because after the 60,000,000 gallon threshold was reached the retailer was taxed on gross receipts for all sales from "dollar one" (*Merit Oil of New York, Inc. v New York State Tax Commn.*, 111 Misc 2d 118, 120, *supra*).[3]

Stewart Dry Goods and *Merit Oil* stand for the proposition that gross receipts taxes that treat similarly situated taxpayers differently based on sales volume violate equal protection because they are imposed without regard to profits. Stated differently, *Stewart* holds that the Legislature may not classify taxpayers on the basis of gross receipts or sales volume for the purpose of imposing different tax rates and then utilize the amount of gross receipts to determine the amount of tax due as well (see *Mobil Oil Corp. v Tully*, 113 Misc 2d 885, 886, affd *sub nom Shell Oil Co. v New York State Tax Commn.*, 91 AD2d 81). This case is distinguishable from *Stewart Dry Goods* and *Merit Oil*, however, because although liability for the tax imposed by Article 31-B is determined by the amount of gross consideration, the actual calculation of the tax due depends entirely on the gain realized from the real property transfer. As Special Term recognized, "[t]he gross consideration of a million dollars or more merely sets the parameters of the class of property subject to the tax." The tax imposed is not on the gross consideration received but rather on the gain that results when the consideration received for the transfer exceeds the original purchase price of the real property (see Tax Law § 1440[3]).

Plaintiffs also contend that the statutory definition of "original purchase price" does not adequately reflect the basis of the real property and will lead to imposition of the tax when a net loss

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[3] Although the opinion in *Merit Oil* refers to the tax as a "gross profits tax", it was in fact a "gross receipts" tax (see former Tax Law § 182[1], [2][b], as added by L 1980, ch 271, § 3).

is sustained (see *id.* § 1440[5]). The statute defines "gain", however, as the difference between "consideration" (after deduction of brokerage fees) and the "original purchase price" (see Tax Law § 1440[1], [3], [5]) and the regulations promulgated by the Department of Taxation and Finance to implement the statute make it clear that all customary, reasonable and necessary costs related to the acquisition and improvement of real property are included in the original purchase price so that the tax will be imposed only in the case of a net profit (see 20 NYCRR pt 590).

The Legislature may establish the exemption at $1 million for at least two related reasons despite the inequalities that may result. So long as it taxes only net gains, it rationally could believe that "generally speaking" profits increase as the amount of gross consideration received increases (see *Stewart Dry Goods Co. v Lewis*, 294 US 550, 559, *supra*). This is especially true in light of the Legislature's conceivable view that imposing the tax on every gain resulting from the transfer of real property, no matter how small the transaction, would be economically inefficient and counterproductive. Additionally, "[a]dministrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others.*** We cannot say that the expense and inconvenience of collecting the tax from small*** [real estate transactions] would not be disproportionate to the revenue obtained" (*Carmichael v Southern Coal & Coke Co.*, 301 US 495, 511; see also *Spatt v City of New York*, 13 NY2d 618, 619; *Matter of Kenning v New York State Department of Taxation and Finance*, 72 Misc 2d 929, 933, affd 43 AD2d 815). Since it is established that the Legislature may exempt some taxpayers on this basis, where it draws the line "is peculiarly a question for legislative decision" (*Carmichael v Southern Coal & Coke Co.*, *supra*, p 511) especially in the field of taxation where, "even more than in other fields, legislatures possess the greatest freedom in classification" (*Madden v Kentucky*, 309 US 83, 88, *supra*).

Turning to the Legislature's different tax treatment of condominium and cooperative developers on the one hand and subdivided improved realty on the other, it is apparent that the

classification employed is rationally related to the legitimate state purpose of raising the revenues necessary to finance the State Budget and provide needed government services because: (1) condominium and cooperative developments involve greater administrative cost to state government as a result of more extensive special laws, regulations and inquiries than apply to subdivided improved realty (see e.g., General Business Law §§ 352-e to 352-eeee [application of Martin Act to condominiums and cooperatives]; Real Property Law §§ 339-d to 339-ii [Condominium Act]); (2) condominium and cooperative developments, because they are more likely to occur in urban areas than subdivisions, make greater demands on needed public services; and (3) treating sales of condominium and cooperative units as separate tax transactions would entail greater administrative costs than in the case of subdivided realty, thereby reducing the net revenue produced by the tax. In addition, the Legislature rationally could have believed that the challenged classification would further the conceivable purposes of encouraging the development of individually-owned residences while at the same time discouraging the rapid conversion of scarce rental apartments to condominiums and cooperatives.

These are legitimate state purposes justifying the classifications adopted, whether they are the purposes which actually motivated the Legislature or not, and inasmuch as the classifications are rationally related to their achievement, the legislation has a rational basis (see *Maresca v Cuomo*, 64 NY2d 242, 251, *supra; McGinnis v Royster*, 410 US 263, 276).

Accordingly, the judgment of Supreme Court should be modified, with costs, to declare that Article 31-B of the Tax Law (L 1983, ch 15, § 181) is constitutional and, as so modified, affirmed, with costs to defendants.

Trump, et al. v. Chu

KANE, J. (dissenting)

As the majority notes, a heavy burden is cast upon one who challenges the constitutional validity of a revenue measure on the ground that it is violative of the equal protection clause of both the United States Constitution (US Const, 14th Amend) and the New York State Constitution (NY Const, art 1, § 11). Indeed, we all agree that to pass constitutional muster "***the classification challenged [must] be rationally related to a legitimate State interest" (see *New Orleans v Dukes*, 427 US 297, 303). Contrary to the majority, however, I am unable to conclude that the challenged classifications are rational.

I turn first to a consideration of the classification between transferors who sell their real property for $1,000,000 or more and those who sell property for less than $1,000,000. In this regard, it should be noted that in order for a tax classification to be rational, not arbitrary, the classes must be so defined that those in similar circumstances are treated with at least approximate equality. Upon a mere cursory examination of the provisions of Tax Law § 1443, one can legitimately conclude that small profits may be taxed, while large profits may escape the tax. Furthermore, persons who make the same amount of profit from the sale of two similar pieces of real property may or may not pay a tax, depending only on the amount of consideration; namely whether that consideration be $1,000,000 or $999,999. Such a result does not even approximate equality. Of course, a State legislature is free to establish taxable status without adherence to rigid rules (*Carmichael v Southern Coal & Coke Co.*, 301 US 495, 509), but this power is not absolute and must rest on principles of fairness and equity since:

> [t]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification "must rest upon some ground of difference having a

> fair and substantial relation to the object of the legislation." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37; *Airway Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160.

(*Allied Stores of Ohio v Bowers*, 358 U.S. 522, 527).

In this case, it seems to me the classification misses the mark. The classes created are suspect because they do not originate from other than natural circumstances. The differences are mere differences that do not exist apart from the statute. They are artificially created by the statute (*Louisville Gas & Electric Co. v Coleman*, 277 US 32, 37; see also *Metropolitan Life Ins. Co. v Ward*, ____ US ____, 53 USLW 4399). Even if one accepts the majority's conclusion that the Legislature may establish an exemption of $1,000,000 despite the resulting inequality in the amount of tax to be paid, the classification is still invalid for

> * * * classification good for one purpose may be bad for another; and it does not follow that, because of proportioning the tax it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt (*Louisville Gas & Electric Co. v Coleman*, 277 US 32, 38, *supra*).

Further, the attempted classification is purely arbitrary because, as established, it is not related to the purpose of the tax. The tax is, essentially, a tax on profits; it is not a property tax. Thus, the classification based on property value is not related to the subject matter of the tax. No one would deny the power of the Legislature to enact a 10% capital gain surcharge on every taxable transfer of real property in the State, but when such a tax statute arbitrarily treats similarly situated sellers of real property differently, in a discriminatory manner without rational basis to support the disparate treatment, it runs afoul of the equal protection clause. There is no argument advanced that inequality

is justified for any economic or social policy reasons or that the tax is upon the competitive advantage of one group over the other, for, as has been demonstrated, those with large profits may escape the tax, while those in a so-called weak position may have to pay.

Moreover, any claim that the classification is founded upon ability to pay should be rejected when practical economic considerations are examined more closely. It cannot be denied that, pursuant to the statute, classification is based entirely upon the amount of the consideration, while the tax is computed solely on the amount of the gain. We should not indulge in the stereotyped assumption that a seller in the taxed class is better able to pay the tax than a seller in the exempt class, for the contrary may well be true. Such thinking is seriously flawed because when the tax imposed is based entirely upon the amount of gain realized, it is not rationally related to the seller's ability to pay just because the sale price was over $1,000,000. A similar rationale may be found in *Stewart Dry Goods Co. v Lewis* (294 US 550), wherein the court held that ability to pay cannot be used as a justification for treating classes of taxpayers disparately if the bases for creating these classifications are *not* related to the ability to pay. This same case also addressed the concept of "administrative convenience" as supplying a rationale [sic] basis for classification of taxpayers (*id.*, at 560). We need not concern ourselves with that argument in this case, for it is certain that, in any event, where applicable, the tax will be collected. It is statutorily mandated that no transfer of an interest in real property in New York State can be recorded in the appropriate land records unless the parties provide the recording officer with the applicable affidavit (furnished by the New York State Department of Taxation and Finance), showing payment of the tentative tax due, or the State Tax Commission's statement that no tax is due (Real Property Law, § 333 [1-f][a]).

There are additional grounds to invalidate the tax. In the determination of the quantum of "gain" on a particular transaction, the majority finds comfort in a recently promulgated regulation of the Department of Taxation and Finance which permits the inclusion of all customary, reasonable and necessary costs related

to the acquisition and improvement of real property in the "original purchase price" so that the tax will be imposed only in case of a net profit (see 20 NYCRR part 590). It should be noted, however, that "soft costs" related to *selling* are excluded from a determination of the "original purchase price" (Tax Law, § 1440 [3]). These costs include such items as advertising, public relations and marketing, field office expenses, maintenance expenses, business taxes and warranty costs (see 35 Syracuse L Rev 609, 615 [1984]). These expenses, which may be considerable, do not reduce the net gain subject to the tax and again offend the principle set forth in *Stewart* (*supra*). Additionally, in the statutory scheme the foreclosure of a mortgage can result in taxation of a party who has realized no gain (Tax Law, § 1447 [3], 1440 [7]; see, also, 35 Syracuse L Rev 609, 619-620 [1984], *supra*). For example, if a borrower obtains a mortgage loan in excess of the purchase price of the mortgaged property, defaults and the mortgage is foreclosed, the tax must be paid on the "gain" (Tax Law, § 1440 [1][3][7]). If the borrower cannot pay the tax, the new transferee, such as a bank bidding in on foreclosure sale or any other third party, must pay the tax in order to record the referee's deed (Real Property Law, § 333 [1-f]).

Finally, the disparate tax treatment of condominium and cooperative developers on the one hand, and developers of subdivided residential realty on the other, is equally offensive under the tests applied above. Condominium and cooperative developments are not peculiar to urban areas. Indeed, cluster-type condominium development is encouraged for ecological as well as practical reasons (cf. *Matter of Friends of the Shawangunks v Knowlton*, ____ NY2d ____ [Mar. 19, 1985], slip opn pp 8-9). The indiscriminate classification between developers of condominiums and cooperative dwellings, and developers of subdivided parcels with improved residences, lacks any rational basis in law or in logic (see *Weissman v Evans*, 56 NY2d 458).

The tax violates the equal protection clause of both the United States Constitution (US Const, 14th Amend) and the New York State Constitution (NY Const, art I, § 11). Plaintiffs' cross motion for such a declaration should therefore be granted.

* * * * * * * * * * * * * * * * * * *

Judgment modified, with costs to defendant, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Simons in which Judges Jasen, Meyer and Alexander concur. Judge Kane dissents and votes to reverse in an opinion. Chief Judge Wachtler and Judge Kaye took no part.

Decided April 30, 1985

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York 10007.

Present: Hon. Burton S. Sherman,

Justice.

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DONALD J. TRUMP

– against –

RODERICK CHU, etc.

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The following papers numbered 1 to 10 read on this motion argued and submitted

No. 12 on Calendar of November 29, 1983.

Notice of Motion and papers and Affidavits Annexed and Memo Cross Motion and Supplemental Replying

See Companion Motion # 217

Upon the foregoing papers this motion is decided in accordance with accompanying memorandum decision.

Dated March 6, 1984
Briefs: Plaintiff's 3 Defendant's 1

County Clerk's No. 21703 1983

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

INDEX NO. 21703/83
12 of 11/29/83

----------X

DONALD J. TRUMP

Plaintiff,

—against—

RODERICK CHU, individually and as Commissioner of the New York State Tax Commission,

Defendant.

----------X

BURTON S. SHERMAN, J:

Motion #12 and #217 of November 29, 1983 are consolidated herein for disposition.

The defendant, the New York State Tax Commissioner, moves to dismiss the complaint of the plaintiff, Donald J. Trump, and the amended complaints of the plaintiff, Richard Pellicane, which seek a judgment declaring Article 31-B of the Tax Law (L1983, ch 15) unconstitutional and permanently enjoining defendant from enforcement of such tax, on the grounds that the complaints fail to state a cause of action. The plaintiffs cross-move for summary judgment declaring Article 31-B unconstitutional.

Article 31-B, enacted as part of a comprehensive omnibus tax law to provide the revenues necessary to finance the 1983-1984 State Budget, imposes a tax of 10% on the gain realized from the transfer of controlling interest in real property. This tax does not apply to transfers where the considerations is less than one million dollars or to the subdividing and sale of real property improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan.

The complaints challenged the constitutinality [sic] of Article 31-B of the Tax Law alleging that it violates the Equal Protection clause of both the United States and New York State Constitutions in that the ta: 's triggered by the amount of the gross consideration without regard to the gain realized, it discriminates against developers of cooperatives and condominiums while giving preferential treatment to developers who build and sell separated detached residential housing and that it also discriminates between real property transferors and transferors of all other property. The complaint of the plaintiff Pellicane further alleges that the statute unconstitutionally violates the Due Process Clause in that the amount of appreciated value accruing to real estate prior to the effective date of the statute is taxed retrospectively.

This court will separately address each of these constitutional challenges starting with the claim that Article 31-B violates the Due Process Clause. Although, the plaintiff Pellicane maintains that this tax is retrospective, the mere fact that a tax is retrospective would not automatically constitute a violation of Due Process. Retrospective taxes have generally been upheld as constitional "as long as the legislature's economic policies fall within the scope of its constitional [sic] authority, foster no invidious discrimination, infringe no independent constitutionally protected interest, and reasonably serve legitimate legislative purposes." (Matter of Cartridge Tel. 535 F 2d 1388, 1392)

In any event, this tax is not a retrospective tax as "a retrospective tax is one that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred." (Black's Law Dictionary, 5th Edition, p 1184). The fact that this plaintiff; an owner of a large parcels of real property, may now be subject to a real property transfer tax, on any gain realized from the sale of such property, which prior hereto he was not subject to, does not make the tax retrospective. With the enactment of any new tax, that which previously was a nontaxable event necessarily will now become a taxable event. The prior appreciation of the plaintiff's property is not the taxable transactions as the tax is due only upon the transfer of real property. There is no retrospective period with respect to this tax

as all transfers of real property made prior to the effective date of the statute were not subject to this 10% gains tax. In fact, the statute specifically exempted all transfers, even those after the effective date, if such transfers were pursuant to agreements entered into before the statute's effective date. Accordingly, this court finds that Article 31-B does not violate the Due Process Clause of either the United States or New York State constitutions.

The court will next address the argument that the tax violates the Equal Protection Clause in that the tax is without regard to the gain realized. The plaintiffs maintain that since this tax is triggered only where the amount of the gross consideration is one million or more, the tax may treat taxpayers with identical gains differently. In fact, transferors of real property with gross consideration of less than one million dollars may generate a larger gain than transfers of property in excess of one million dollars without incurring any tax liability.

The cases upon which the plaintiff's rely in this area deal with court decisions holding taxes upon gross receipts without regard to profits, unconstitutional. The tax in this case, while triggered by the amount of gross consideration limits the tax to the amount of the gain. The gross consideration of a million dollars or more merly sets the parameters of the class of property subject to the tax. While this method of taxation must result in some inequalities, "inequalities which result from a singling out of one particular class for taxation for exemption, infringe no constitutional limitation." (Charmichael [sic] v Southern Coal, 301 US 495,509). In Shell Oil Co. V [sic] Tax Comm., 91 AD2d 81, the court sustain [sic] the classification which subjected only oil companies producing more than 100,000 average barrels of crude oil per day, having a refining capacity in excess of 175,000 average barrels of crude oil per day, to a 2% gross receipts tax. It is therefore clear that the equal protection clause does not prevent a state from taxing competitive advantages and the state may, as it has done, tax large reality [sic] developers without taxing small developers. (See Fox v Standard Oil Co., 294 US 87).

The court now proceeds to plaintiffs' contention that the statute is in violation of the Equal Protection Clause in that it

discriminates against developers of cooperatives and condominiums. The tax treats transfer pursuant to cooperative or condominium plan as a single transfer while sales of subdivided parcels of real property improved with residences are deemed separate transfers.

The law is clear that where taxation is concerned the legislature has extensive latitude in making classifications which in their judgment produce reasonable systems of taxation. (Lehnhausen v Lake Shore Auto Parts Co., 410US356). If there exist conceivable state of facts which would support the distinction the legislature has made between subdivided improved realty and cooperative or condominium apartments the classification is valid. In order to find this classification invalid under the Equal Protection Clause it must be purely arbitrary as to have no reason, not even an insufficient or merely plausible reason, to justify it. (Re Keeney's Estate 194 NY 281, affd 222 US525, Carmichael v Southern Coal Co., 301 US 495).

While this court does not know what prompted the Legislature in distinguishing between cooperative and condominium developers and developers who build and sell separate detached housing, the legislature history not offering any rationale, the plaintiffs have failed to meet their burden of negating every conceivable rational basis to support it. The defendant offers, what this court finds to be, three plausible reasons justifying the difference in classification. The three plausible reasons submitted by the defendant are that the legislature intended to benefit the private home building industry; the legislature intended to impose an extra tax on apartment developers because of the increased public services necessary in urban areas; and the legislature intended to reduce the difficulty in collecting taxes from transferors of condominiums and cooperatives. In addition, this court notes that another rational basis would be a desire to benefit the private home industry since it involves the creation of new housing while cooperatives and condominiums often involve the conversion of previous existing apartment buildings. In addition, the legislature has previously recognized differences between cooperatives and condominiums from other real property. Both cooperatives and

condominiums are to some extent statutory creations, which are closely regulated by the Attorney General of the State of New York, governed by statutes such as the Condominium Act, Article 9-B of the Real Property Law and the General Business Law Sec. 352-e et seq. Accordingly, there is no showing that the different tax treatment amounts to invidious discrimination or is palpably arbitrary or invidious that it runs afoul of the equal protection clause.

With respect to the legislature imposition of this tax only on gains from real property and not other tangible and intangible property, this court finds that the classification is valid as there exists a reasonable basis for differentiating between real property and all other property. (See Heisler v Thomas Clothing Co., 260 US 245).

Therefore, the defendant's motion for an order dismissing the complaint of Donald Trump and the amended complaint of Richard Pellicane for failure to state a cause of action is granted and the plaintiffs' cross motion for summary judgment is denied.

Settle order.

DATED: March 6, 1984

J. S. C.

APPENDIX C

New York County Clerk's Index No. 21703/83

Court of Appeals
State of New York

DONALD J. TRUMP, et al.,

Plaintiffs-Appellants,

– against –

RODERICK CHU, individually and as COMMISSIONER OF THE NEW YORK STATE TAX COMMISSION,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Donald J. Trump, et al., appellants in this action, hereby appeal to the Supreme Court of the United States from the decision of the Court of Appeals for the State of New York made in this action on April 30, 1985.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

/s/ MILTON S. GOULD
SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 370-8000

SAXE BACON & BOLAN, P.C.
39 East 68th Street
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Counsel for Appellants

Dated: New York, New York
May 23, 1985.

RECEIVED MAY 24 1985 COURT OF APPEALS

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX D

ARTICLE 31-B

TAX ON GAINS DERIVED FROM CERTAIN REAL PROPERTY TRANSFERS

Section 1440. Definitions.
1441. Imposition of tax.
1442. Payment of tax.
1443. Exemptions.
1444. Determination of tax.
1445. Refunds.
1446. Interest and penalties.
1447. Filings and procedures.
1448. General powers of tax commission.
1449. Proceedings to recover tax.
1449-a. Information return.
1449-b. Designation of agents.
1449-c. Disposition of revenue.

§ 1440. Definitions. — In this article:

1. "Consideration" means the price paid or required to be paid for real property or any interest therein, less any customary brokerage fees related to the transfer if paid by the transferor. Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed, purchase money mortgage, or payment for an option. Consideration includes the cancellation or discharge of an indebtedness or obligation. In the case of (i) an option transferred with use and occupancy of real property or (ii) creation of a leasehold or sublease that is a transfer of real property as defined in subdivision seven of this section, consideration shall also include the value of the rental and other payments attributable to the use and occupancy of the real property or interest therein and the value of any option to purchase or renew included in such transfer. In the case of a transfer which includes other assets which are in addition to

real property or an interest therein and for which there was no reasonable apportionment of the consideration for such real property or interest, consideration means that portion of the total consideration which represents the value of such real property or interest. In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the fair market value of the interest in real property to the controlling interest for the purpose of ascertaining the consideration for the transfer of such controlling interest.

2. "Controlling interest" means (i) in the case of a corporation, either fifty percent or more of the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation, and (ii) in the case of a partnership, association, trust or other entity, fifty percent or more of the capital, profits or beneficial interest in such partnership, association, trust or other entity.

3. "Gain" means the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price.

4. "Interest" when used in connection with real property includes but is not limited to title in fee, a leasehold interest, a beneficial interest, an encumbrance, a transfer of development rights or any other interest with the right to use or occupancy of real property or the right to receive rents, profits or other income derived from real property.

5. "Original purchase price" means the consideration (i) paid by the transferor to acquire the interest in the real property or (ii) in the case of property acquired through gift or inheritance, the consideration paid by the last transferor who paid consideration to acquire the interest in the real property; plus in both cases the consideration by the transferor for any capital improvements made to such real property (including in the case of clause (ii) above, those by the last transferor who paid consideration) prior

to the date of transfer. In the case of a transfer of a controlling interest in an entity with an interest in real property, there shall be an apportionment of the original purchase price of the interest in real property to the controlling interest for the purpose of ascertaining the original purchase price of such controlling interest.

6. "Real property" means every estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, including buildings, structures and other improvements thereon and leaseholds, which are located in whole or in part within the state. For purposes of this article, there shall be apportionments of consideration and original purchase price in connection with the transfer of real property located partly within the state and partly without the state.

7. "Transfer of real property" means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option transferred with use and occupancy of real property, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in any entity with an interest in real property. Transfer of an interest in real property shall include the creation of a leasehold or sublease only where (i) the sum of the term of the lease or sublease and any options for renewal exceeds forty-nine years, (ii) substantial capital improvements are or may be made by or for the benefit of the lessee or sublessee, and (iii) the lease or sublease is for substantially all of the premises constituting the real property. Transfer of real property shall also include partial or successive transfers pursuant to an agreement or plan to effectuate by partial or successive transfers a transfer which would otherwise be included in the coverage of this article, provided that the subdividing of real property and the sale of such subdivided parcels improved with residences to transferees for use as their residences, other than transfers pursuant to a cooperative or condominium plan, shall not be deemed a single transfer of real property. Notwithstanding the foregoing, transfer of real property shall not include a

transfer pursuant to gift, devise or inheritance or the granting of an option without use and occupancy of real property.

§ 1441. Imposition of tax. — A tax is hereby imposed on gains derived from the transfer of real property within the state. The tax shall be at the rate of ten percent of the gain.

§ 1442. Payment of tax. — The tax imposed by this article shall be paid by the transferor to the tax commission, or to any agent of such commission appointed pursuant to section fourteen hundred forty-nine-b of this article, on the date of transfer. In the case of a transfer pursuant to a cooperative or condominium plan, the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred. For purposes of calculating the amount of tax due in each such transfer, an apportionment of the original purchase price of the real property and total consideration anticipated under such plan shall be made for each such cooperative or condominium unit. Notwithstanding the foregoing, if the tax due exceeds fifty percent of the cash portion of the consideration received by the transferor on or before the date of transfer, the transferor may elect (i) to pay the entire tax, or (ii) where the cash portion of the consideration exceeds the tax due, to pay fifty percent of such cash portion, or (iii) where the cash portion of the consideration is equal to or less than the tax due, to pay the lesser of (a) fifty percent of the tax due or (b) such cash portion, and to pay the balance over three years or the term of the purchase money mortgage given by the transferee to the transferor, in equal annual installments payable on the anniversary date of the transfer, provided however that no such annual installment shall be in an amount less than ten per centum of the balance. If the transferor shall fail to pay any such installment on the date on which it is due, the tax commission may declare the entire unpaid balance of the tax due and owing. At the time payment is made, or in the event of installment payments, at the time the initial payment is made, the transferor shall file a return and the forms required pursuant to section fourteen hundred forty-seven of this article with the tax commission or with the agent designated by the tax commission pursuant to section fourteen hundred forty-nine-b. Such return shall be in a form prescribed by the commission and shall contain such information as it requires.

§ 1443. Exemptions. — No tax shall be imposed in the following cases:

1. If the consideration is less than one million dollars.

2. If the real property consists of premises occupied by the transferor as his residence (but only with respect to that portion of the premises actually occupied and used for such purposes).

3. If the transferor is one of the following:

(a) The state of New York, or any of its agencies, instrumentalities, political subdivisions, or public corporations, including a public corporation created pursuant to an agreement or compact with another state or Canada.

(b) The United Nations or any other international organization of which the United States is a member, the United States of America or any of its agencies or instrumentalities.

(c) An organization described in paragraph (4) of subsection (a) of section one thousand one hundred sixteen of this chapter.

4. Where the transfer of real property is to a corporation upon its organization solely in exchange for the stock or securities in such corporation if immediately after such transfer the person or persons making such transfer are in control. The term control means the ownership of stock possessing at least eighty percent of the total combined voting power of all classes of stock entitled to vote and at least eighty percent of the total number of shares of all other classes of stock of the corporation.

5. If a transfer of real property, however effected, consists of a mere change of identity or form of ownership or organization, where there is no change in beneficial interest.

6. Where a transfer of real property occurring after the effective date of this article is pursuant to a written contract entered into on or before the effective date of this article, provided that the date of execution of such contract is confirmed by independent evidence, such as recording of the contract, payment of a deposit or other facts and circumstances as determined by the tax commission.

§ 1444. Determination of tax. — 1. If a form required by this article is not filed, or if a form when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such records or information as may be obtainable, including the assessed valuation of the real property or interest therein and other appropriate factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after the giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing, the tax commission shall give notice of its determination to the person against whom the tax is assessed. The determination of the tax commission shall be reviewable pursuant to article seventy-eight of the civil practice law and rules[1] if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless: (a) the amount of any tax sought to be reviewed, with penalties and interest thereon, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding; or (b) at the option of the applicant, such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination, plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

2. A person liable for the tax imposed by this article (whether or not a determination assessing a tax pursuant to subdivision

one of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision one of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto.

[1] CPLR 7801 et seq.

§ 1445. Refunds. — 1. A transferor claiming to have erroneously paid the tax imposed by this article may file an application for refund within two years from the date of transfer or, in the event a transferor has elected to pay the tax in installments pursuant to section fourteen hundred forty-two of this chapter, within two years of the date on which the last installment was due. Such application shall be filed with the tax commission on a form which it shall prescribe.

2. The tax commission may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing. After such hearing, the tax commission shall mail notice of its determination to the applicant. Such determination after a hearing may be reviewed by a proceeding pursuant to article seventy-eight of the civil practice law and rules.[1] Such a proceeding shall not be instituted unless an undertaking is filed with the tax commission in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

3. A person shall not be entitled to a refund under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section fourteen hundred forty-four where he has had a hearing or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided. However, a person filing with the tax commission a signed statement in writing, as provided in subdivision two of section fourteen hundred forty-four, before a

determination assessing tax pursuant to subdivision one of section fourteen hundred forty-four, is issued, shall, nevertheless, be entitled to apply for a refund pursuant to subdivisions one and two of this section, as long as such application is made within the time limitation set forth in such subdivision one. No refund or credit shall be made of a tax, interest or penalty paid after a determination by the tax commission made pursuant to section fourteen hundred forty-four unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the tax commission after a hearing or of its own motion, or in a proceeding under article seventy-eight of the civil practice law and rules, pursuant to the provisions of said section, in which event refund or credit shall be made of the tax, interest or penalty found to have been overpaid.

4. Interest shall be allowed and paid upon any refund made pursuant to this section except that no interest shall be allowed or paid if the amount thereof would be less than one dollar. Such interest shall be at the rate set pursuant to section fourteen hundred forty-six and shall have like application, or if no rate is set, at the rate of six per centum per annum from the date when the tax, penalty or interest refunded was paid to a date preceding the date of the refund check by not more than thirty days, provided, however, that for the purposes of this subdivision any tax paid before the last day prescribed for its payment shall be deemed to have been paid on such last day.

[1] CPLR 7801 et seq.

§ 1446. Interest and penalties. — 1. If the tax commission determines that there has been an overpayment of tax, interest shall be paid by the comptroller to the transferor, on any refund paid pursuant to the provisions of section fourteen hundred forty-five of this article. If it determines that there has been an underpayment of tax, the transferor shall pay interest to the commission on the amount of any tax not paid. The commission, by regulation, shall set the rate of interest to be paid on underpayment and overpayment of the taxes imposed by this article at the rate of interest prescribed in subsection (e) of section one thousand ninety-six of this chapter.

2. Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due. Any such penalty shall be paid by the transferor to the tax commission and shall be assessed, collected and distributed in the same manner as the tax imposed by this article and any reference to tax in this article shall be deemed to refer to the penalties imposed in this subdivision.

3. Any transferor not exempt from tax as provided in section fourteen hundred forty-three of this article who willfully violates any provision of this article shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five thousand dollars or imprisoned for not more than one year, or both.

§ 1447. Filings and procedures. — 1. (a) The commissioner of taxation and finance shall make available forms which he shall prescribe, to be completed by each transferor and transferee for each transfer occurring after the effective date of this article.

(b) On the form prescribed for a transferor, the transferor shall set forth the following information: the original purchase price including the consideration paid by the transferor for any capital improvements made to such property, the party or parties to whom such original purchase price was paid, the consideration to be paid by the transferee, the amount of any brokerage fees to be paid and the party or parties to whom such fees will be paid and the anticipated tax due.

(c) On the form prescribed for a transferee, the transferee shall set forth the following information: the consideration paid to the transferor and the amount of any brokerage fees to be paid by him.

(d) Such statements shall be attested to under oath and affirmed as true under the penalties of perjury and if made on behalf of a corporation, partnership, firm, association, or sole

proprietorship shall be deemed to have been made by the controlling shareholders, general partners, members of the association or sole proprietor thereof as well as the person completing such form.

(e) Such forms shall be filed with the state tax commission in accordance with the pre-transfer audit procedure established by the commissioner of taxation and finance. No transfer shall be recorded unless (i) the statement of tentative assessment of the amount of tax or a statement that no tax is due, together with the payment of the tentative assessment of the amount of tax pursuant to subdivision two of this section, if any, or (ii) an affidavit or other form prescribed by the tax commission, fully executed under penalty of perjury, affirming that the transfer of real property is exempt under subdivision two of section fourteen hundred forty-three of this article, shall have been delivered to the recorder of deeds in the jurisdiction in which such property is located.

2. The department of taxation and finance shall make available as soon as practicable a pre-transfer audit procedure to be applicable to all transfers subject to tax under this article. Pursuant to such procedure, the department shall determine a tentative assessment of the tax to be levied hereunder. When the transferor and the transferee shall have furnished pertinent affidavits and any other information necessary to determine such tentative assessment at least twenty days prior to the date of transfer, such department shall provide the transferor and transferee with a statement of tentative assessment of the amount of tax, or a statement that no tax is due, at or prior to the date of closing and, if such affidavits and information are furnished within such period, such department shall provide such statement as soon as practicable, but not later than twenty days from the date such affidavits and other information have been furnished to the tax commission. The tentative assessment of the amount of tax due shall not be deemed to be a determination of the actual amount of tax due.

3. (a) Whenever the transferor or transferee shall fail to give such pertinent affidavits and other information to the department

of taxation and finance as required by this section, or whenever such department shall inform the transferee that a tentative assessment of such tax exists, any sums of money, property or other consideration, which the transferee is required to transfer over to the transferor shall be subject to a first priority right for any such taxes stated to be due from the transferor to the state in such tentative assessment, and (except as provided in paragraph (b) of this subdivision) the transferee is forbidden to transfer to the transferor any such sums of money, property or consideration to the extent of the amount of the state's claim stated in such tentative assessment, whether or not the transferor has represented to, or informed the transferee that, he owes any tax pursuant to this article, and whether or not the transferee has knowledge that such taxes are owing, and whether any such taxes are in fact owing. Whenever the department shall fail to give such statement of a tentative assessment of such tax to the transferor and the transferee, within twenty days from receipt of such pertinent affidavits and such other information, such failure will release the transferee from any further obligation to withhold any sums of money, property or other consideration, which the transferee is required to transfer over to the transferor; except that with respect to matters pending on the effective date of this article such twenty day period shall not begin to run until ninety days after the effective date of this article. For failure to comply with the provisions of this subdivision, the transferee (except as provided in paragraph (b) of this subdivision) shall be personally liable for the payment to the state of any such taxes stated in such tentative assessment to be due to the state from the transferor, except that the liability of the transferee shall be further limited to the sums of money, property or other consideration which the transferee is required to transfer over to the transferor, and such liability may be assessed and enforced in the same manner as the liability for tax under this article. Upon receipt of such statement of tentative assessment mailed or delivered within the twenty days as aforesaid of the notice of the stated amount of the state's claim from the department, and demand for payment thereof, the transferee may make payment of such claim to the state from any sums of money, property, or consideration withheld in accord with the provisions of this paragraph, except that such payment shall be limited to the sums of money, property or other

consideration which the transferee is required to transfer over to the transferor, and upon making the payment, such transferee shall be relieved of all liabilitity for such amounts to the transferor, and such amounts paid to the state shall be deemed satisfaction of the tax liability of the transferor, to the extent of the amount of such payment.

(b) Notwithstanding paragraph (a) of this subdivision, the transferee is not forbidden to transfer the consideration to the transferor and the transferee shall be released from personal liability where a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in the state and acceptable to the tax commission is filed with such commission conditioned upon payment of the balance of tax due on which the transferee is liable.

(c) Where the liability of a transferee, for the payment to the state of any such taxes determined to be due from the transferor, has been wholly paid or satisfied or no longer exists, the tax commission shall mail to such transferee a notice, addressed to his last known address, setting forth that such liability has been wholly paid or satisfied or no longer exists. The tax commission shall include in such notice the following additional information:

(1) the name and last known address of the transferee;

(2) the amount of the tax paid, satisfied or vacated; and

(3) a statement to the effect that consumer reporting agencies must delete from a credit file any reference to the particular tentative tax assessment within thirty days of receipt from the transferee of such notice. Provided, however, no order or decree in a bankruptcy proceeding shall be construed as giving rise to the requirement that the notice provided for in this paragraph be given.

§ 1448. General powers of tax commission.—1. The tax commission shall administer and enforce the tax imposed by this article and it is authorized to make such rules and regulations, and

to require such facts and information to be reported, as it may deem necessary to enforce the provisions of this article. Where the tax commission finds that the transfer of any real property or an interest therein has been so formulated that the primary purpose of such formulation is the avoidance or evasion of the tax imposed by this article, rather than for an adequate business purpose, the tax commission shall treat such transfer as subject to the tax imposed by this article.

2. The tax commission for the purpose of ascertaining the correctness of any return, or for the purpose of making an estimate of tax of any person, shall have power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda related to the matters required to be included in the return, and may require the attendance of the person rendering the return or any officer or employee of such person, or the attendance of any other person having knowledge of the matters included in the return, and may take testimony and require proof material for its information, with power to administer oaths to such person or persons.

3. Every transferor subject to tax under this article is required to keep complete records of acquisitions and transfers of interest in real property and controlling interest as defined in this article. Such records shall include copies of the contract of sale, the title report, if any, the questionaire and return filed, the closing statement, records of the costs and dates of acquisitions and improvements, and the general books of account of a person which would reflect the acquisition or transfer of an interest in real property, including a controlling interest. Such records shall be made available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee and shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer. Evidence of payment of tax to the tax commission such as a cancelled check, a receipt, or a receipted return, must be preserved.

4. The tax commission, of its own motion, may abate any small unpaid balance of an assessment of the tax to be levied hereunder, or any liability in respect thereof, if the tax commission determines under uniform rules prescribed by it that the administration and collection costs involved would not warrant collection of the amount due. It may also abate, of its own motion, the unpaid portion of the assessment of any tax or any liability in respect thereof, which is excessive in amount, or is assessed after the expiration of the period of limitation properly applicable thereto, or is erroneously or illegally assessed. No claim for abatement under this subdivision shall be filed by a taxpayer.

5. (a) Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, any officer or employee of the department of taxation and finance, any person engaged or retained by such department on an independent contract basis, or any person who, pursuant to this section, is permitted to inspect any report or return or to whom a copy, an abstract or a portion of any report or return is furnished, or to whom any information contained in any report or return is furnished, to divulge or make known in any manner the particulars set forth or disclosed in any report or return required under this article.

(b) The officers charged with the custody of such reports and returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the tax commission in any action or proceeding under the provisions of the tax law or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the tax commission is a party or a claimant, or on behalf of any party to any action or proceeding under the provisions of this article when the reports, returns or facts shown thereby are directly involved in such action or proceeding, in any of which events the court may require the production of, and may admit in evidence, so much of said reports, returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more.

(c) The tax commission may, nevertheless, publish a copy or

a summary of any decision rendered after the hearing required pursuant to this chapter.

(d) Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return or report filed in connection with his tax or to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the attorney general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding under this chapter has been recommended by the commissioner of taxation and finance or the attorney general or has been instituted, or the inspection of the reports or returns required under this article by the comptroller or duly designated officer or employee of the state department of audit and control, for purposes of the audit of a refund of any tax paid by a taxpayer under this article other than the amount of a tentative assessment furnished in accordance with section fourteen hundred forty-seven of this chapter.

(e) Any violation of the provisions of this subdivision shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the state, he shall be dismissed from the office and be incapable of holding any public office in this state for a period of five years thereafter.

§ 1449. Proceedings to recover tax.—1. Whenever any transferor shall fail to pay any tax, penalty or interest imposed by this article, the attorney general shall, upon the request of the tax commission, bring or cause to be brought an action to enforce the payment of the same on behalf of the state of New York in any court of the state of New York or of any other state or of the United States. If, however, the tax commission, in its discretion believes that any such transferor subject to the provisions of this article is about to cease business, leave the state or remove or dissipate the assets out of which the tax or penalty might be

satisfied, and that any such tax or penalty will not be paid when due, it may declare such tax or penalty to be immediately due and payable and may issue a warrant immediately.

2. As an additional or alternate remedy, the tax commission may issue a warrant, directed to the sheriff of any county commanding him to levy upon and sell the real and personal property of any transferor liable for the tax, which may be found within his county, for the payment of the amount thereof, with any penalties and interest, and the cost of executing the warrant, and to return such warrant to the tax commission and to pay it the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the county clerk a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and the interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of taxation and finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the tax commission may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the state had recovered the judgment therefor and execution thereon had been returned unsatisfied.

§ 1449-a. Information return.—1. Every corporation subject to the requirements of articles nine, nine-A, thirty-two and thirty-

three of this chapter [1] and having an interest in real property in this state shall keep a record of the transfer of its stock and report every transfer of a controlling interest in its stock and such other information as the tax commission may require to enforce this article. Such report shall be filed annually or more often as the tax commission may require and the tax commission may permit or require such report to be filed with or as part of any report or return required under such articles nine, nine-A, thirty-two and thirty-three. The tax commission may administer this provision in conjunction with such articles.

2. Every partnership, trust, estate or other entity having an interest in real property in this state shall likewise keep a record of and report every transfer of a controlling interest in its capital, profits or beneficial interests and such other information as the tax commission may require to enforce this article. Such report shall be filed annually or more often as the tax commission may require and the tax commission may permit or require such report to be filed with or as part of any return required under article twenty-two of this chapter.[2] The tax commission may administer this provision in conjunction with such article twenty-two.

[1] Tax Law §§ 180 et seq.; 208 et seq.; 1455-a et seq.; 1500 et seq.

[2] Tax Law § 601 et seq.

§ 1449-b. Designation of agents.—1. The tax commission is authorized, if it deems such action necessary, to designate recording officers, title insurance corporations and banking corporations or associations to act as its agent for purposes of collecting the tax imposed by this article. The tax commission shall provide for the manner in which such person may be designated as its agent subject to such terms and conditions as it shall prescribe. Every person designated to act as an agent pursuant to this section shall remit to the tax commission any funds collected by it as such agent, less any fee allowed under this section, at such times as the tax commission shall prescribe and shall follow such procedures and keep such records as the tax commission may prescribe. Each county (other than the counties comprising New York city) and New York city shall pay all expenses occasioned by the duties of their respective recording officers to collect the tax imposed by this article, including any expense for extra clerks.

2. Every recording officer designated to act as such agent shall be paid a fee of one dollar for each filing of a statement of tentative assessment of the amount of tax, statement that no tax is due or affidavit or other form prescribed by the tax department delivered pursuant to paragraph (e) of subdivision one of section fourteen hundred forty-seven. Such fee shall be paid by the transferor, except no fee shall be collected where the transferor is an organization described in subdivision three of section fourteen hundred forty-three of this article. Such a fee paid to the register of the city of New York shall belong to the city of New York and such a fee paid to a recording officer of a county outside such city shall belong to such officer's county. With respect to any other agents designated to act pursuant to this section, the tax commission shall have the power to provide, in its discretion, for payment of a fee to such agent, in such manner and amount and subject to such limitations as it may determine, but any such fee shall not be greater than the sum of one dollar for each form delivered pursuant to such paragraph (e). A recording officer shall not be liable for any penalty provided for under this article for any inaccuracy in the amount of tax he shall collect under this article so long as he shall compute and collect such tax on the amount of the gain shown on the form delivered to him pursuant to such paragraph (e). For purposes of this article, the term "recording officer" means the county clerk of the county, except in a county having a register, where it means the register of the county, or in the city of New York where it means the city register.

§ 1449-c. Disposition of revenue.—All taxes, penalties and interest received by the tax commission under this article shall be deposited and disposed of pursuant to the provisions of section one hundred seventy-one-a of this chapter.

§ 182. The sum of one million eight hundred thousand dollars ($1,800,000), or so much thereof as may be necessary, is hereby appropriated to the department of motor vehicles from any moneys in the general fund to the credit of the state purposes account for the implementation of a motor vehicle photo identification license program. Such moneys shall be payable from

the state treasury on the audit and warrant of the comptroller on vouchers certified or approved in the manner prescribed by law during the state fiscal year commencing April first, nineteen hundred eighty-three.

§ 183. If any clause, sentence, paragraph or part of this act or the application thereof to any person or circumstances shall for any reason be adjudged to be invalid, such judgment shall not affect, impair or invalidate the remainder, and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered, and to the person or circumstances involved.

§ 184. This act shall take effect immediately, provided that:

(a) The provisions of sections two, three and fifty-two of this act shall take affect April first, nineteen hundred eighty-three and shall apply to convictions for acts or omissions occurring on and after such date;

(b) The provisions of sections, four, five and seven through twenty-six shall take effect May first, nineteen hundred eighty-three, except that, with respect to renewals of registrations, the provisions of such sections shall also apply to renewals of registrations expiring on or after May thirty-first, nineteen hundred eighty-three which are issued prior to May first, nineteen hundred eighty-three and shall not apply to renewals of registrations expiring on or before April thirtieth, nineteen hundred eighty-three which are issued prior to May thirtieth, nineteen hundred eighty-three; and the provisions of sections six and twenty-seven shall take effect June first, nineteen hundred eighty-three, except that, with respect to renewals of licenses, the provisions of section twenty-seven of this act shall also apply to renewals of licenses expiring on or after June thirtieth, nineteen hundred eighty-three which are issued prior to June first, nineteen hundred eighty-three and shall not apply to renewals of licenses expiring on or before May thirty-first, nineteen hundred eighty-three which are issued prior to June thirtieth, nineteen hundred

eighty-three; and section one hundred eighty-two of this act shall take effect April first, nineteen hundred eighty-three;

(c) The provisions of sections twenty-eight and twenty-nine shall take effect April first, nineteen hundred eighty-three;

(d) The provisions of sections thirty and thirty-one shall take effect April first, nineteen hundred eighty-three, provided, however, that the provisions of sections thirty and thirty-one of this act shall apply to licenses issued on or after that date; the provisions of section thirty-two of this act shall take effect May first, nineteen hundred eighty-three and shall remain in full force and effect until April thirtieth, nineteen hundred eighty-five at which time the language of paragraphs (a) through (f) of subdivision one of section four hundred twenty-four of the tax law shall revert to the language of such paragraphs as it existed immediately prior to the amendments made by section thirty-two of this act;

(e) The provisions of sections thirty-five through fifty-one shall be deemed to have been in full force and effect on and after January first, nineteen hundred eighty-three; provided, however, that the provisions of sections thirty-five through fifty shall take effect on July first, nineteen hundred eighty-three or on such date as the tax imposed under section three thousand four hundred fifty-one of the Internal Revenue Code [1] shall take effect whichever date shall occur later and shall remain in full force and effect only for so long as such section of the Internal Revenue Code shall remain in full force and effect and shall apply to payments of interest, dividends and patronage dividends paid or credited on or after such effective date, provided, however, that section forty-three of this act shall apply with respect to returns or statements the due date for the filing of which (determined without regard to extensions) is after December thirty-first, nineteen hundred eighty-three, the amendment to subsection (j) of section six hundred eighty-five of the tax law made by section forty-four of this act shall apply with respect to statements, the due date for the filing of which (determined without regard to extensions) is after December thirty-first, nineteen hundred eighty-three, the amendment to subsection (k) of section six hundred eighty-five of the

tax law made by section forty-four of this act shall apply with respect to returns, statements, or other documents the due date for the filing of which (determined without regard to extensions) is after December thirty-first, nineteen hundred eighty-three, and section forty-five of this act shall apply to returns the due date for the filing of which (determined without regard to extensions) is after December thirty-first, nineteen hundred eighty-three;

(f) The provisions of sections fifty-three and fifty-four shall take effect April first, nineteen hundred eighty-three.

(g) The provisions of sections fifty-five and fifty-six of this act shall take effect May first, nineteen hundred eighty-three but shall not apply to transfers of property made on or after such date pursuant to contracts entered into prior to such date.

(h) The provisions of sections fifty-seven through one hundred thirty-eight shall apply to taxable years commencing after December thirty-first, nineteen hundred eighty-two; provided, however, that sections fifty-seven, sixty-four through sixty-eight, one hundred three through one hundred seven, one hundred thirteen through one hundred seventeen and one hundred thirty through one hundred thirty-seven of this act shall take effect April first, nineteen hundred eighty-three; sections fifty-eight and one hundred thirty-eight of this act shall be deemed to have been in full force and effect as of July seventeenth, nineteen hundred eighty-one; sections sixty, sixty-two, seventy-seven through seventy-nine, one hundred, one hundred two, one hundred nine, one hundred eleven, one hundred twenty-two and one hundred twenty-three of this act and paragraph twenty-seven of subsection (b) of section six hundred twelve of the tax law as added by section seventy-four of this act, paragraph twenty-eight of subsection (c) of section six hundred twelve of the tax law as added by section seventy-six of this act, paragraph twenty-eight of subdivision (b) of section T46-112.0 of the administrative code of the city of New York as added by section one hundred nineteen of this act, and paragraph twenty-seven of subdivision (c) of section T46-112.0 of such code as added by section one hundred twenty-one of this act shall apply to taxable years commencing after December

thirty-first, nineteen hundred eighty-one; sections eighty, eighty-five, eighty-six, ninety-six, ninety-eight, one hundred twenty-four and one hundred twenty-nine of this act shall take effect September first, nineteen hundred eighty-three and shall apply to interest accruing on or after such date on amounts (including interest) remaining unpaid on or after such date, sections eighty-one, eighty-three, eighty-seven, ninety-four, one hundred twenty-five and one hundred twenty-seven of this act shall apply to interest accruing on or after September first, nineteen hundred eighty-three, and sections eighty-two, eighty-four, ninety-three, ninety-five, ninety-seven, one hundred twenty-six and one hundred twenty-eight of this act shall apply to returns filed on or after September first, nineteen hundred eighty-three; and sections eighty-eight through ninety-one of this act shall apply to declarations and installments of estimated tax for taxable years beginning after December thirty-first, nineteen hundred eighty-two.

(i) The provisions of sections one hundred forty, one hundred forty-one, one hundred forty-two, one hundred forty-three and one hundred forty-four of this act shall take effect April first, nineteen hundred eighty-three.

(j) The provisions of sections one hundred forty-six and one hundred forty-seven of this act shall take effect April first, nineteen hundred eighty-three, except that section ninety-two of the transportation law, as added by section one hundred forty-seven of this act, shall take effect July first, nineteen hundred eighty-three, and section ninety-three of the transportation law, as added by section one hundred forty-seven of this act, shall take effect February first, nineteen hundred eighty-four.

(k) The provisions of section one hundred forty-eight of this act shall take effect June first, nineteen hundred eighty-three.

(l) The provisions of sections one hundred forty-nine through one hundred fifty-eight of this act shall take effect April first, nineteen hundred eighty-three.

(m) The provisions of paragraphs (a), (c), (h) and (i) of subdivision one of section three hundred of the abandoned property law, as respectively amended and added by sections one hundred seventy-five, one hundred seventy-six and one hundred

seventy-eight of this act, shall take effect June first, next succeeding the date on which it shall have become a law.

(n) The tax imposed by section one hundred eighty-one of this act shall not apply (i) to any transfer made on or before the effective date of this act, or (ii) to transfers by the sponsor or a nominee thereof of cooperative or condominium units pursuant to a plan filed with the attorney general prior to the effective date of this act, provided that a closing amendment for such plan has been submitted to the attorney general within ten business days after such date, such plan is declared effective by the sponsor pursuant to the appropriate filing with the attorney general within forty days of such date, and transfers of individual units are made within ninety days of the filing of such closing amendment.

[1]26 U.S.C.A. § 3451.

Supreme Court, U.S.
FILED
OCT 1 1985
JOSEPH F. SPANIOL, JR.
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No. 85-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD J. TRUMP, et al.,

Appellants,

— against —

RODERICK CHU, Individually and as Commissioner of the New York State Tax Commission,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Questions Presented

1. Whether appellants have raised a substantial federal question that N.Y. Tax Law, Article 31-B, imposing a gains tax on the transfer of certain realty for a consideration of one million dollars or more, violates the equal protection clause?

2. Whether appellants have raised a substantial federal question that the classifications under Article 31-B between sales pursuant to a condominium or cooperative plan and those of subdivided parcels improved with residences constitutes a violation of the equal protection clause?

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No. 85-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD J. TRUMP, et al.,

Appellants,

— against —

RODERICK CHU, Individually and as Commissioner of the New York State Tax Commission,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee, Roderick Chu, Commissioner of the New York State Tax Commission, moves to dismiss or affirm on the ground that this appeal fails to present a substantial federal question and the decision of the court below is so obviously correct as to warrant no further review.

Statement of the Case

The appellee adopts and relies on the facts and statutory analysis of the majority opinion below in the New York Court of Appeals. (1a-8a)*.

* References to pages in the appendix to the Jurisdictional Statement are indicated as (—a).

Argument

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The New York Court of Appeals was correct in holding that the tax classification under N.Y. Tax Law, Article 31-B (McKinney 1975, as amended), is a rational one in conformity with constitutional requirements of equal protection. In so holding, the court broke no new ground, but simply applied the long standing principle of constitutional law enunciated on numerous occasions by this Court that " 'legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.' " *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 [1983]); *accord Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-527 (1959). The decision below conflicts with no decision of this Court and, as found below, is readily distinguishable from the principal case relied upon by appellant, *Stewart Dry Goods v. Lewis*, 294 U.S. 550 (1935).

a. *The Million Dollar Threshold of N.Y. Tax Law, Article 31-B Rests On A Rational Basis.*

In an equal protection challenge to a tax statute, the plaintiff has the heavy burden of "negat[ing] every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). So long as there is a "conceivable" basis for the tax classification — whether articulated by the legislature or not — and the question is one at least debatable, the tax law must be upheld. *Western & Southern Life Insurance v. Board of Equalization*, 451 U.S. 648, 674 (1981) (citing *United States v. Carolene Products*, 304 U.S. 144, 154 (1938]); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981). Further, in examining a particular statute, the courts may not assume that the legislature "was not aware of facts which afford a reasonable

basis for its actions," *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509-510 (1937), nor are state defendants "required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Cremery*, 449 U.S. at 464. Rather, appellants bear the burden of proving the legislature acted irrationally.

In this case, the million dollar threshold contained in Article 31-B merely sets the "parameters of the class of property subject to the tax." (17-a.) Real property sold for a consideration of one million dollars or more is subject to taxation under Article 31-B only in the event there is a gain accruing to the seller. If there is a gain, the tax is imposed uniformly only on the gain, not on the gross consideration. If there is no gain, there is no tax. The million dollar threshold is similar in principle to every state or federal tax law containing a classification keyed to monetary value or income.* Monetary classifications in the tax laws are pervasive and consistently have been upheld by this Court.**

As the Court of Appeals found (7a), the threshold here may be based upon a legislative policy to limit the tax's application

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* Two of the best known of such laws are the standard deduction on personal income taxes and the unified credit on estate taxes. Individuals earning less than the standard deduction pay no income tax, whereas those earning more are subject to taxation on all their income. *See, e.g.*, I.R.C. § 1 (1976); N.Y. Tax Law § 362 (McKinney 1975). Likewise, estates below a certain value are not subject to tax. *See, e.g.*, I.R.C. § 2002 (1976); N.Y. Tax Law § 952(b) (estate tax).

** *E.g.*, *Clark v. Titusville*, 184 U.S. 329 (1902) (state occupation license tax that varied according to sales volume upheld); *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898) (upheld inheritance tax which imposed 3% tax on $10,000 estates, but 4% tax on an estate of $10,001); *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912) (state licensing tax on hand laundries not a denial of equal protection even where steam laundries with larger sales volume paid a lesser tax); *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61 (1913) (upheld $1,000 tax on theatres charging one dollar or more admission but only $400 tax where admission less than one dollar, even though higher admission may have generated less revenue).

to monetarily substantial transactions, where a greater absolute gain is more likely and where the seller may be better able to absorb an additional tax burden. Such an economic consideration is itself sufficient to support the classification. *See Fox v. Standard Oil Co.*, 294 U.S. 87, 100(1935) ("the state may tax the large chains more heavily than the small ones..."). The statutory threshold may also be based upon the cost and difficulty of administering and collecting such a tax for all real estate transactions, no matter how small. A separate gains tax on all real estate transactions without regard to the value of consideration could generate administrative problems, particularly because a deed cannot be filed until it is determined no tax is owed or the tax owed has been paid. This factor in and of itself is also sufficient to uphold the classification here as rational. *See Fernandez v. Wiener*, 326 U.S. 340 (1945); *New York Rapid Transit Corp v. City of New York*, 303 U.S. 573 (1938); *Carmichael v. Southern Coal Co.*, 301 U.S. at 511; *People ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907), *affg*, 184 N.Y. 431 (1906).

The appellants' assertion (J.S.8)* that some real property owners who sell property for less than one million dollars may have gains and yet pay no gains transfer tax is irrelevant to the constitutional issues here.** This Court has repeatedly held that in determining what transactions are taxable, "rational distinctions may be made with substantially less than mathematical exactitude" without offending the equal protection clause. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *accord Kahn*

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* References to pages in the Jurisdictional Statement are indicated as (J.S.-).

** The appellants also argue (J.S.9-10) that under Article 31-B a tax may be imposed even though the transferor realizes no economic profit because the statute fails to consider so-called "soft costs" as reducing any "gain." The court below properly rejected this argument, and stated that relevant tax regulations implementing Article 31-B make provision for the deduction of "all customary, reasonable and necessary costs" thus assuring that a tax will be imposed only where a transaction results in a net gain. *See* 20 N.Y.C.R.R. 590.

v. Shevin, 416 U.S. 351 (1973); *Lehnhausen v. Lake Shore Auto Parts; Dandridge v. Williams*, 397 U.S. 471, 485 (1974).* Indeed, in establishing classifications, "every line drawn by a legislature leaves out some that might well have been included. That exercise of discretion, however, is a legislative, not a judicial function." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). Nearly a century ago, this Court stated that in taxation "the rule of equality permits many practical inequalities and necessarily so. In a classification for governmental purposes, there cannot be an exact exclusion or inclusion of persons and things." *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 296 (1897). Consequently, equal protection "does not require ... exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances." *Id* at 300. Here, appellant has utterly failed to show any respect in which Article 31-B is "utterly invidious" or "palpably arbitrary". *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. at 359-360.

Appellant's reliance upon *Stewart Dry Goods v. Lewis* is misplaced, as the Court of Appeals correctly noted. (5a-6a). *Stewart* concerned recurring gross receipts taxes, imposed irrespective of gains, rather than, as here, a one-time transfer tax imposed only if there is a gain. A gross receipts tax, unlike a gains tax, is measured by sales rather than any profit derived from sales. Such a tax reaches back and is imposed upon each sale, beginning with "dollar one." The transfer tax under Article 31-B, on the other hand, does not reach back and is not imposed upon the gross consideration of the real property transfer; it is a tax imposed only on the gain and is measured only as a flat percentage of the gain. Further, in *Stewart*, unlike the gains tax in Article 31-B, businesses were subjected to increased rates of taxation as their volume of sales increased. Under Article 31-B, a straight ten percent tax is imposed, whether the gain is one dollar or fifty million dollars.

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* *Lehnhausen* also teaches us that even though a tax may "collaterally" impose a heavy burden, or even destroy, a type of occupation or business, this, of itself, does not give rise to a constitutional issue. 410 U.S. at 360.

The appellant's repeated efforts to characterize the gains tax of Article 31-B as a "gross receipts" tax, similar to that in *Stewart*, are without merit. The tax under Article 31-B is not a gross receipts tax because it is based on the *net gain*. This Court in *Stewart* recognized as critical this obvious distinction, as the Court of Appeals noted (5a-6a):

> The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise.

294 U.S. at 558 (quoting *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 328 [1918]). This Court in *United States Glue Co.*, cited by *Stewart*, had pointed out why a distinction between a gross receipts tax measured in terms of net gain was needed:

> [A tax upon gross receipts] may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown . . . and the tax cannot be heavy unless the profits are large.

247 U.S. at 328.

The limited application of the *Stewart* case is further explained in *New York Rapid Transit Corp. v. City of New York*. In that case, this Court affirmed the New York Court of Appeals and upheld a gross receipts tax imposed upon "utilities," a classification which by statutory definition included the New York Rapid Transit Corporation. In rejecting the taxpayer's argument (303 U.S. at 581) that the tax was discriminatory because it was less able to pay a gross receipts tax than were other utilities, this Court also rejected the taxpayer's reliance

upon *Stewart*, noting that "the tax held invalid in that case increased in rate with increasing volume" and "[f]or that reason it was thought necessary to inquire whether the tax could be justified as related to ability to pay . . . ." *Id*, 303 U.S. at 583.

Here a flat percentage tax is imposed solely to the extent of the gain, if any. If there is no gain, there is no tax; all taxpayers who transfer property subject to Article 31-B are subject to the same tax rate. The monetary threshold of Article 31-B is rational and raises no substantial federal question.

b) *The Legislative Decision To Tax Substantial Transfers of Realty Pursuant To A Cooperative or Condominium Plan On A Basis Different From Subdivided Parcels Improved With Residences Also Rests On A Rational Basis.*

Appellants' argument that the difference in tax treatment under Article 31-B between realty sold pursuant to a cooperative or condominium plan and subdivided parcels improved with residences raises no substantial federal question. In applying the equal protection clause, this Court has granted state legislatures great leeway in making classification as needed, in their judgment, to produce reasonable and workable systems of taxation. *Western & Southern Life Insurance v. Board of Equalization; Lehnhausen v. Lake Shore Auto Parts; Allied Stores of Ohio v. Bowers*; *Madden v. Kentucky*, 309 U.S. at 88. Moreover, in establishing a tax classification, "even a small difference in the method of conducting business may be availed of by government in imposing different taxes." *Stewart Dry Goods Co. v. Lewis*, 294 U.S. at 565. Unless the difference in tax treatment is "utterly invidious" or "palpably arbitrary," which it is not the case here, the statute must be upheld. *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. at 359-360. Given such wide discretion in determing tax classification, it is no surprise this Court has upheld numerous tax schemes

involving classification which, like Article 31-B, differentiate between similar or related transfers, enterprises or activities.*

In this case, we need look no further than the Consolidated Laws of New York to find a rational distinction between condominium and cooperatives on the one hand and subdivided parcels on the other. Condominiums and cooperatives are creatures of the law. Each has an identity in the law separate from other types of realty. New York statutes contain numerous provisions which distinguish condominiums and cooperatives from other forms of property.** They create a state regulatory

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* *E.g., First Federal Savings & Loan v. Massachusetts Tax Commission*, 437 U.S. 255 (1978) (tax imposed on savings & loan associations but not on credit unions); *United States v. Maryland Savings – Share Insurance Corp.*, 400 U.S. 4 (1970) (upheld tax exemption for certain non-profit corporations organized before Sept. 1, 1957, but not for those thereafter organized); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1958) (storage tax on merchandise but not on property held by nonresidents "for storage only"); *Walters v. City of St. Louis*, 347 U.S. 231 (1954) (tax on gross salaries of employed persons but on net profits of self-employed, no denial of equal protection); *Carmichael v. Southern Coal & Coke Co.* (employers with less than eight employees excluded from tax); *Liggett Co. v. Lee*, 288 U.S. 517 (1933) (tax distinction between wholesalers and retailers); *State Board of Tax Comm. v. Jackson*, 283 U.S. 527 (1931) (tax imposed on chain store and not on competing department store, even though latter had more sales); *Heisler v. Thomas Coiliery Co.*, 260 U.S. 245 (1922) (tax on anthracite but not on bituminous coal); *Armour & Co. v. Virginia*, 246 U.S. 1 (1918) (tax distinction between manufacturer selling own product and merchants selling same product); *Brown-Foreman v. Kentucky*, 217 U.S. 563 (1910) (tax on blended but not on unblended whisky); *Metropolitan Street Ry. Co. v. New York State Bd. of Tax Commissioners*, 199 U.S. 1 (1905) (upheld tax distinction between surface street railroad and sub-surface railroad).

** *See, e.g.*, N.Y. General Business Law, Article 23-A (Mckinney 1968) (Martin Act regulating offering and sale of condominiums and cooperatives: formation, organization and review by Attorney General); N.Y. Real Property Law, Article 9-B (McKinney 1968) (Condominium Act); *see, also*, N.Y. General Obligations Law, §5-501(3) (McKinney 1978) (issuance of securities as to cooperatives); N.Y. Tax Law, § 360(12) (McKinney 1975) (definition of personal income as to cooperative apartment owner); General Obligations Law, § 5-601 (escrow accounts); Real Property Law, § 254-b (McKinney 1968) (limitation on late charges re financing of cooperative); Real Property Tax Law, § 580 (McKinney 1972) (assessment of property owned by cooperative or condominium).

role in the offering of such properties for the New York Attorney's General's office (which is not the case with the sale of other types of residences such as single-family homes).

The clear distinction the law makes between condominiums and cooperatives, on the one hand, and other types of property is *per se* sufficient to justify the challenged classification. *See First Federal Savings & Loan v. Massachusetts Tax Commission*, 437 U.S. 255 (1978)(tax distinction between credit unions and savings and loan associations based, in part, on different treatment under non-tax statutes); *Lehnhausen v. Lake Shore Auto Parts* (distinction for tax purposes between corporate entities and individuals); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. at 578-580 (tax on "utilities" upheld, in part, as recognizable class because of special treatment under existing regulatory scheme); *Lawrence v. State Tax Commission*, 286 US 276, 284 (1932) (rational consideration for classification based, in part, on historical distinction in tax law). How the legislature chooses to tax according to this distinction (taxing only one class, taxing both at the same or equal rates, taxing neither, etc.) is a purely legislative matter which does not implicate equal protection considerations.

Apart from these distinctions found in the law itself, it is evident, as the court below found (14a-15a), that any one of a number of other considerations constitutes a sufficient basis. *See Quong Wing v. Kirkendall*, 223 U.S. 59, 62 (1912) (*Holmes*, J.) (revenue measure may effectuate legitimate state purpose by "favor[ing] certain industries or forms of industry" over others). The Legislature may well have believed (a) that the private home building industry, because of a long-term recession in that market, should not be burdened with an additional tax which might discourage construction of needed moderate-cost residential housing; (b) that New York's rental apartment market could be adversely affected by an additional tax, whereas its vital condominium and cooperative market can more readily cope with such an economic burden; (c) that state taxing policy is an appropriate way to moderate the rapid conversion of scarce

rental apartments to cooperatives and condominiums; (d) that condominium and cooperative developments involve greater administrative costs to state government as a result of special laws, regulations and inquiries which do not apply to other forms of property; (e) that condominium and cooperative apartments, predominantly in urban areas of the state, make greater demands on needed government services than do other types of real estate; and (f), that treating condominium and cooperative sales under Article 31-B as separate tax transactions would create administrative difficulties and additional costs in the collection of the tax.* Although the appellants may seek to debate the judgment of the legislature in creating a tax classification based upon any one or more of these factors, they have utterly failed to demonstrate that classification totally lacks support by any "conceivable" rational basis.

Thus, the decision below upholding the constitutional validity of Tax Law, Article 31-B raises no substantial federal question. Appellants cannot show that either the monetary threshold or the difference in tax treatment between types of real estate was indubitably irrational. On the contrary, as the Court of Appeals found, both classifications are reasonably related to valid state interests.

* This is especially so in cooperative conversions, where the transferee is generally a cooperative apartment corporation which issues shares in the corporation (and does not grant a deed) to the cooperators.

CONCLUSION

As Appellants Have Failed To Raise A Substantial Federal Question, This Court Should Dismiss The Appeal Or Affirm

Dated: New York, New York
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No. 85-118

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RODERICK CHU, Individually and as Commissioner of the New York State Tax Commission

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REPLY MEMORANDUM FOR THE APPELLANTS

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In its Motion to Dismiss or Affirm ("Mot."), the State has utterly failed to respond to our arguments that New York's Ten Percent Tax on transfers of interests in realty violates the Equal Protection Clause.

1. Although the Ten Percent Tax is nominally directed at gains, its imposition in the first instance depends entirely upon whether the gross consideration for the transfer is $1 million or more. Thus, the tax is triggered only when there is a sale for $1 million or more. Sales for less than $1 million are entirely

exempt. In these circumstances, the State can hardly deny that the tax turns on the amount of the gross receipts from a particular transfer.

Such classification of taxpayers on the basis of gross receipts is prohibited by the Equal Protection Clause, as explicated by this Court's decision in *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935). While the State concedes that taxpayers with equal amounts of gains may be treated differently under the statute, it flatly dismisses such discriminatory treatment as "irrelevant to the constitutional issues here" (Mot. 4). With all due respect, the discrimination worked by the $1 million cutoff in the statute could not be more relevant to the constitutional questions presented.

In the State's view, the $1 million cutoff amount is justified on the grounds that "a greater absolute gain is more likely" in "substantial transactions" and upon "the cost and difficulty of administering and collecting such a tax for all real estate transactions . . ." (Mot. 4). But as we have pointed out at pp. 11-12 of our Jurisdictional Statement ("J.S."), both of these precise contentions were rejected by this Court more than 50 years ago in *Stewart Dry Goods*. As the Court there stated, "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits . . ." (294 U.S. at 558). Nor can the tax be justified on the basis of purported administrative convenience. There is no administrative necessity that the tax be geared to gross consideration rather than gain. "If the [State] desires to tax [gains from real estate transfers] it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection" (294 U.S. at 560). Surely, the State cannot at this juncture resurrect arguments that this Court long ago laid to rest as credible defenses to an unconstitutional state taxing scheme. Since the decision below is incompatible with *Stewart Dry Goods*, the appeal warrants plenary consideration by this Court.

2. Contrary to the State's further argument (Mot. 3), the $1 million cutoff of the Ten Percent Tax is not analogous to monetary classifications in income and estate taxes. The base of an income tax is net income; the personal exemptions and the standard deduction allowed by the income tax merely enhance its progressive nature and insure that the tax is premised on the principle of ability to pay. "An income levy, by its very nature, assures equality of treatment, because the burden of the exaction varies with increase or decrease of return on capital invested and with the comparative success or failure of the enterprise." *Stewart Dry Goods Co.* v. *Lewis*, *supra*, 294 U.S. at 560. In marked contrast to net income taxes, the $1 million cutoff makes it possible for the Ten Percent Tax to be levied on small gains while large gains are entirely exempt.

Nor can the $1 million cutoff be defended, as the State suggests, on the ground that it is similar to provisions found in many estate tax statutes under which estates that do not exceed a certain amount are exempt from the tax. Unlike real estate developers who are subject to the Ten Percent Tax, those persons who are subject to estate taxes are not competing with one another in the marketplace. But exempting some real estate developers from the Ten Percent Tax on the basis of the $1 million cutoff, combined with the discrimination against cooperative and condominium developers (see J.S. 12-17), gives distinct competitive advantages to certain classes of real estate transferors. On the other hand, taxing only estates which exceed a certain size simply reduces to some extent amounts passing to the beneficiaries of those estates. This does not, however, place them under any meaningful competitive disadvantage vis-a-vis the beneficiaries of the smaller, untaxed estates.

3. *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938), upon which the State relies (Mot. 6-7) as demonstrating "[t]he limited application" of *Stewart Dry Goods*, is wide of the mark. That case has no relevant bearing

upon the problem of unlawful classifications, which is at the heart of our challenge to the Ten Percent Tax.[1] The tax at issue in *New York Rapid Transit* was a three percent excise tax on gross income, imposed on every "utility" doing business in the City of New York, "for the privileges of exercising its franchise" (303 U.S. at 575-576). The taxpayer based its challenge to the tax, *inter alia*, on a claimed lower ratio of gross income to profit than other utilities, arguing that the tax discriminated against the New York Rapid Transit Corporation because it was less able to pay than other utilities. In rejecting this claim, this Court explained that *Stewart Dry Goods* does not prohibit a uniformly imposed flat-rate gross receipts tax. Rather, the Court had struck down the tax on retailers in *Stewart Dry Goods* because, by increasing the tax rate with the sales volume, the statute " 'exact[ed] from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other' " (303 U.S. at 583, quoting *Stewart Dry Goods Co.* v. *Lewis*, *supra*, 294 U.S. at 566).

Here, however, the Ten Percent Tax is not uniformly imposed on equal amounts of gain. By exempting transferors of real property for less than $1 million, it increases the tax rate from zero to 10% on the basis of gross consideration in the same manner that *Stewart Dry Goods* prohibits. Accordingly, the Ten Percent Tax cannot pass constitutional muster because it exacts different tolls from transferors who are identically situated in the amount of gain they realize. It is plain that the Ten Percent Tax is nothing more than a prohibited gross receipts tax in the guise of a gains tax.[2]

---

1 The plaintiff's unsuccessful challenge in *New York Rapid Transit Corp.* to the imposition of a special tax on the class of utilities is immaterial to the present case, where the challenged distinction between taxpayers drawn by the statute is based solely upon the consideration for transfers and the kind of property they develop, rather than upon the substantive nature of their business.

2 There is no basis for the State's reliance (Mot. 3, n. **), upon cases upholding license taxes based upon gross receipts. While this Court has

4. Finally, in attempting to improvise a rational basis for the statutory discrimination against cooperative and condominium developers, the State argues (Mot. 8) that the laws of New York themselves provide distinctions between condominiums and cooperatives and other types of realty. But abstract statutory distinctions in the law of real property do not, standing alone, justify the discrimination worked by the Ten Percent Tax. As we have pointed out (J.S. 12), there must be a rational relationship between the statutory discrimination and a legitimate state purpose.

Here, the State and the decision below attribute various regulatory goals to the legislature in support of the discrimination against cooperatives and condominiums. For the reasons we have previously stated (J.S. 13-17), it is plain that the State's justifications for the discrimination are entirely implausible. For example, the State continues to argue (Mot. 10) that condominiums and cooperatives involve greater administrative costs to the state government which the Ten Percent Tax could have been intended to fund. But it is entirely disingenuous for the State to continue to advance this argument before this Court in the face of the compellingly clear legislative history we have cited (see J.S. 14-15) that the state legislature intended the various statutory filing fees—and not the Ten Percent Tax—to reimburse the State for the costs of regulating the sale of cooperatives and condominiums. The State's failure to address this legislative history is emblematic of the fundamental weakness of its various rationalizations for the statutory discrimination.

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sustained such taxes on the basis of the competitive advantage that higher-volume businesses enjoy, the transferor of realty for more than $1 million has no competitive advantage over the transferor for less than $1 million that would justify the statutory discrimination. See *Stewart Dry Goods Co.* v. *Lewis, supra*, 294 U.S. at 564-566.

CONCLUSION

For the reasons stated above and in our Jurisdictional Statement, probable jurisdiction should be granted.

Respectfully submitted,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE REAL ESTATE BOARD OF NEW YORK, INC., *AMICUS CURIAE*, IN SUPPORT OF JURISDICTIONAL STATEMENT

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PRELIMINARY STATEMENT

This brief is submitted, pursuant to Rule 36 of the Rules of this Court, on behalf of The Real Estate Board of New York, Inc. ("REBNY"), *amicus curiae*, in support of the position of the appellants to the extent that they seek (1) to have the Court note probable jurisdiction of this appeal and (2) a reversal of a judgment of the New York Court of Appeals upholding, as constitutional, Article 31-B of the New York State Tax Law,

enacted on March 28, 1983, which imposed a ten percent tax (the "Ten Percent Tax") on the proceeds derived from certain transfers of real property located within New York State. Tax Law § 1441. (App. A., page 25a.)[1]

QUESTION PRESENTED

Whether the Ten Percent Tax, the applicability of which is dependent on the amount of gross receipts derived from a transfer of real property, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

INTEREST OF THE *AMICUS*

REBNY is a trade association which exists to represent and further the interests of the participants in the New York City real estate market. REBNY's membership consists of over four thousand property owners, developers, brokers, managers, attorneys, architects, insurance companies, banks, utilities, quasi-public agencies, title companies, appraisers, consultants and other institutions and individuals professionally interested in Manhattan real estate.

Originally organized in 1896, REBNY is comprised of four divisions which devote their energies to particular aspects of the real estate business affecting its members. One of these divisions, the Owners and Builders Division, is further divided into committees focusing on, among other things, legislation and taxes. This Division's members are deeply involved in every area of public policy touching on the construction process and receive frequent advisories on pertinent laws and regulations. Another division, the Allied and Associates Division, was organized to reflect the wide interests of New York's business community with a special emphasis on tax policy.

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1 References thus: "(App. __, page __)" are to the Appendix accompanying the appellants' Jurisdictional Statement.

Thus, REBNY represents the interests of all facets of the real estate industry in the locale where the impact of the Ten Percent Tax is undeniably greatest—New York City. Indeed, it appears that the New York legislature, in making the Ten Percent Tax applicable to condominium and cooperative developments where the aggregate consideration to the developer for the sale of a entire development equals or exceeds one million dollars while exempting from the Tax similar transactions involving the development of subdivided parcels of land with improved residences, intended that the burden of the Ten Percent Tax should fall most heavily upon the New York City real estate market, where a significant amount of condominium and cooperative development takes place.

Accordingly, REBNY agrees with the appellants' position on this appeal and submits this *amicus* brief because it believes that the Ten Percent Tax discriminates against identically situated taxpayers on the basis of varying levels of gross receipts derived from the transfer of real property, in violation of the Equal Protection Clause of the Fourteenth Amendment.

THE QUESTION IS SUBSTANTIAL

A. Introduction.

Prior to March 31, 1983, the real estate business in New York State was able to be conducted in an expeditious and efficient manner. Its participants were able to structure transactions in ways creative enough to meet the rapidly changing needs of the people who lived here and the businesses which were located here because governmental intervention, while not non-existent, was sufficiently non-interferent to afford the real estate industry the flexibility necessary to compete in the real estate market and provide the residential and commercial space needed for a healthy economy.

On March 31, 1983, with the enactment of the Ten Percent Tax, all that changed. In enacting the Ten Percent Tax as part of a larger revenue-raising package requested by the executive

branch of the government, the Legislature injected itself into real estate transactions to such a great extent as to remove much of the flexibility which the industry had previously enjoyed. As shown below, because of the enactment of the Ten Percent Tax, no longer can many real estate transactions be structured to include purchase money debt in order for them to be consummated free of the additional costs, constraints and uncertainties of traditional institutional financing. Similarly, no longer can an entrepreneur readily sell one piece of property at a loss in the hope that the loss will be offset by gains realized in future transactions. No longer, moreover, can an individual who owns property with others as tenants in common join his co-owners in a sale of the property free of the Ten Percent Tax, regardless of how small his share may be. In addition, no longer can an individual of modest means agree to purchase a condominium or cooperative apartment confident that when he has paid the purchase price of his apartment, his obligations in connection with the purchase will be satisfied. No longer, indeed, can almost any significant real estate transaction be consummated on an immediate basis, even if the seller, purchaser and lender all agree that it should be.

Simply put, the Ten Percent Tax has transformed what previously was an industry with the flexibility needed to be responsive to the ever changing needs of a fast-paced marketplace into an industry in which governmental intervention, with all its attendent delays and confusion, is the rule. Since there is very little legislative history to explain what the Legislature hoped to accomplish in passing the Ten Percent Tax, we cannot speculate on the ends it had in mind. What is apparent, however, is that the Legislature, in enacting the Ten Percent Tax, allowed its desire to raise revenues for New York State to cause it to draft legislation which has burdened every aspect of transactions in real estate and changed completely the manner in which they are carried out. This ill-considered legislation has created artificial market forces favoring some taxpayers over others identically situated. Inevitably, all who are subject to the Ten Percent Tax have a strong incentive to

counter these artificial market forces by artificially structuring future transactions so as to avail themselves of loopholes. The obvious consequence is that the industry and marketplace suffer by reason of the artifice.

Thus, while REBNY agrees with appellants that the Ten Percent Tax is unconstitutional (1) in that it discriminates against taxpayers situated similarly on the basis of whether the proceeds of a transfer equal or exceed $1 million or whether they are transferring condominium or cooperative apartments as opposed to subdivided parcels of land with improved residences thereon, and (2) in that it is drafted in such a way as to tax gross receipts rather than gains, REBNY also wishes to demonstrate to the Court how pervasive the impact of the Ten Percent Tax is and how su' tantial the constitutional question raised by appellants is. What follows, therefore, is a summary of the more onerous provisions of the Ten Percent Tax. Thereafter, we address the constitutional issues raised in the court below.

B. Impact Of The Ten Percent Tax.

As appellants observe in the Jurisdictional Statement (page 7), the Ten Percent Tax has imposed an extremely onerous financial burden upon the New York real estate industry, having drained upwards of $300 million from the industry in each year since its enactment in March 1983. It goes without saying that every dollar required to be paid to the State of New York under the Ten Percent Tax equates to a dollar taken out of the mainstream of capital for future transactions which stimulate activity in an industry vital to the economic viability of the State of New York. In quantitative terms alone, therefore, the validity of the Ten Percent Tax is a question of enormous significance.

There is more. Although the courts below analyzed the Ten Percent Tax primarily in terms of the disparate impact created by the $1 million threshhold, a reading of Article 31-B of the Tax Law reveals that the impact of the Ten Percent Tax is far

more pervasive than simply imposing a levy on transfers of property for consideration of $1 million or more, while exempting entirely transactions for lesser consideration even though they might generate enormous gains. Some of the other ways in which the Ten Percent tax impacts on the real estate industry are summarized below.

1. One particularly burdensome aspect of the Ten Percent Tax is that it discourages sales involving purchase money mortgages, which traditionally have been vital to a multitude of real estate transactions. This is so because, although the Tax Law (§ 1442; App. D., page 25a) permits the deferral of a portion of the Ten Percent Tax if not all the consideration is paid in cash at the time of the transfer, the timetable for payment of the remainder of the Tax is dictated by statute and is not dependent upon the payment schedule provided for in the instrument of indebtedness.[2] Particularly where the transferor accepts partial payment in the form of a *long term* purchase money mortgage, therefore, the Ten Percent Tax must be paid in full years before the consideration giving rise to the Tax is received. This produces an incongruous result. In addition, the statute makes no provision for the transferor to receive a deduction or refund if the full amount of the purchase money indebtedness is not ultimately paid. Thus, the Ten Percent Tax has a significant adverse impact on real estate transactions throughout New York because it discourages property owners from voluntarily entering into any transaction where the entire consideration is not payable at the time the transaction is consummated. Stated another way, the statute frustrates the consummation of any transaction in which purchase money financing is an essential ingredient.

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2 Where a transferor holding a purchase money mortgage elects to defer payment of a portion of the Ten Percent Tax (which is both prudent and necessary where there is a deferral by the transferee of the payment of the purchase price), he must, regardless of the repayment terms of the mortgage, make an initial Tax payment in an amount dictated by statute and pay the balance of the Tax due in equal annual installments of at least ten percent of the balance. Tax Law § 1442. (App. D., page 25a.)

2. The impact of the Ten Percent Tax is not limited to the transferor. The transferee, being in effect secondarily liable for the Ten Percent Tax (Tax Law § 1447(3); App. D., pages 31a-33a), has an obvious interest in ensuring that the Tax has been paid. Although the need for a transferee to ensure that payment has been made in individual transactions for $1 million or more may be clear, the purchaser of a cooperative or condominium unit for less than $1 million may become liable for the Ten Percent Tax without even being aware that the Tax is applicable to the apartment he is purchasing. For example, an individual who purchased the stock allocated to a cooperative unit for $150,000 in a building having an aggregate sale price of $1 million or more would be secondarily liable for a proportionate share of the Ten Percent Tax if any gain were realized on the building as a whole. Although the statute (§ 1447(3)(a); App. D., pages 31a-32a) gives the Department of Taxation and Finance a first priority on any sums the transferee is required to pay the transferor where the Ten Percent Tax is unpaid, it affords the transferee no protection if the entire purchase price is paid to the transferor before the transferee learns that there is Tax due. In our example, therefore, if the innocent purchaser paid for his apartment in full before discovering that the Ten Percent Tax was applicable and had not been paid, the purchaser would be liable for the Tax himself and would be relegated to suing the transferor to recover any Tax payments he was required to make.

3. The Ten Percent Tax also discriminates against mortgage holders in transactions involving the cancellation of indebtedness. Section 1440(1) of Article 31-B (App. D., page 22a) provides that for the purpose of determining whether the Ten Percent Tax is applicable, the term "[c]onsideration includes the cancellation or discharge of an indebtedness or obligation. . . ." Thus, if a mortgage lender faced with a default in a sum exceeding the borrower's basis in the mortgaged property (a likely occurrence where a borrower has refinanced his purchase of property) accepts a deed in lieu of instituting foreclosure proceedings, the resulting transfer will

be subject to the Ten Percent Tax if the amount of the debt being discharged equals or exceeds $1 million. Assuming, as is likely, that the defaulting borrower is unable to pay the Ten Percent Tax resulting from the transfer, the obligation to pay the Tax will fall upon the lender, even though the lender is forgiving a debt by accepting a deed to property purchased for less than the amount of the debt. To avoid this, an aggrieved mortgagee must, as a practical matter, resort to foreclosure proceedings to collect the unpaid debt in any case where the debt exceeds the borrower's basis and the mortgagee has any doubts concerning the ability of the borrower to pay the Ten Percent Tax. Accordingly, the Ten Percent Tax has the effect of encouraging costly, protracted litigation and discouraging the settlement of disputes involving mortgage defaults.

4. Another significant burden created by The Ten Percent Tax is its discriminatory effect on taxpayers who earn their livelihoods by buying and selling real property. Since the Ten Percent Tax is applied on a transaction-by-transaction basis, taxpayers are precluded from offsetting gains realized in particular transactions by losses incurred in others, even though they can do so for income tax purposes. Thus, a taxpayer may be required to pay substantial sums of money pursuant to the Ten Percent Tax even though he incurs a net loss on his real property transfers over the course of a year.

5. The Ten Percent Tax also discriminates against persons who own real property as tenants in common. For example, if property owned by two individuals as tenants in common, each owning an undivided fifty percent interest, were sold for $1 million, each co-tenant's interest would be subject to the Ten Percent Tax even though his individual interest was worth, and he received, only $500,000. Thus, an interest which would otherwise be exempt from the Ten Percent Tax is taxable if it is sold together with other interests in property held in common ownership for a price equalling or exceeding $1 million.

6. The Ten Percent Tax has a substantial impact on the New York real estate industry as a whole. Because the Ten Percent Tax requires that all transactions subject to it be scrutinized by

the Department of Taxation and Finance before a deed can be recorded, it is critical that all necessary documents be prepared and filed at least twenty days before a transfer is to take place. (Tax Law § 1147(2); App. D, page 31a.) Merely by virtue of its existence, therefore, the Ten Percent Tax imposes a substantial impediment to the expeditious consummation of transfers of real property and, as a result, severely undermines the flexibility of New York's real estate industry.

7. Finally, by virtue of its very existence, the Ten Percent Tax has a detrimental effect upon the efficacy of conducting real estate transactions within the State of New York. While we cannot know with certainty how many transactions have not taken place because of the discriminatory impact of the Ten Percent Tax, reason compels the conclusion that the number is substantial because such transactions are clearly less attractive due to the Tax. Moreover, unexploited opportunities for real estate development preclude real estate tax assessors from considering the selling prices of properties in making their assessments. Particularly when the market is strong, foregone sales deny to assessors one of their most vital tools in assessing taxes and prevent real estate taxes from rising to their full potential. Thus, the Ten Percent Tax, to the extent it has a chilling effect on development, has an adverse effect on the amount of revenues available for such purposes as educating the State's schoolchildren.

In short, the Ten Percent Tax has a pervasive impact on every aspect of transactions involving the transfer of real property for consideration of $1 million or more, not because such transactions are inherently complicated but, rather, because the New York Legislature has arbitrarily determined that such transactions should be burdened by an onerous tax and onerous administrative procedures. Since the Ten Percent Tax has imposed enormous burdens on the New York real estate industry, in both quantitative and qualitative terms, this Court should note probable jurisdiction, and, since the Tax is arbitrary and discriminatory, the Court should set it aside on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment.

C. Applicable Constitutional Principles.

As the dissenting judge in the court below correctly observed, "in order for a tax classification to be rational, not arbitrary, the classes must be so defined that those in similar circumstances are treated with approximate equality." (App. A., page 9a.)[3] This view of the requirements of equal protection comports with Supreme Court precedent. As this Court has stated, a legislature's power to classify is not unlimited:

> [T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37; *AirWay Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959). We submit that the majority in the court below, in holding that the Ten Percent Tax is constitutional, effectively turned its back on this time-honored principle.

Before addressing itself to the constitutionality of the Ten Percent Tax, the court below stated that " 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . .' " (App. A., page 4a) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)); *see also Allied Stores of Ohio, Inc. v. Bowers*, *supra*, 358 U.S. 522, 527-28. The court below then hypothesized two bases on which, in its view, the New York Legislature might

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3 We note that while the opinion of the court below was not yet officially reported at the time appellants filed the Jurisdictional Statement, the opinion has since been reported, at 65 N.Y.2d 20 (1985).

justifiably have enacted the Ten Percent Tax. First, the Legislature might reasonably have believed, according to the court below, that " 'generally speaking' " the gross profits of real estate transactions increase as the amounts of gross consideration increase. (App. A., page 7a) (quoting *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 559 (1935).) In reaching this conclusion, the court suggested that it was "conceivable" that the Legislature viewed taxing smaller transactions as "economically inefficient and counterproductive. . . ." (App. A., page 7a.) Second, the court speculated that the Ten Percent Tax might have been enacted so as to tax transactions for consideration of $1 million or more based on considerations of "administrative convenience." (*Id.*) In the court's view, either rationale would be sufficient to uphold the Ten Percent Tax on constitutional grounds.

The court below did not base its holding on any legislative history and, moreover, did not provide any support for the view that the classification resulting from the Ten Percent Tax treats taxpayers selling real property for $1 million or more and taxpayers selling real property for less than $1 million with "approximate equality." Indeed, the court, while paying lip service to sound arguments demonstrating that the Ten Percent Tax accords widely varying treatment to taxpayers situated similarly (App. A., at 3a-4a), declared that the Ten Percent Tax is constitutional without responding to those arguments. We submit that the court below erred and that the Ten Percent Tax is unconstitutional under the principles set forth in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935).

In *Stewart Dry Goods*, the plaintiffs challenged as unconstitutional a Kentucky statute which imposed a tax on retail merchants on the basis of their gross receipts. The tax at issue amounted to one-twentieth of one percent on a retail merchant's first $400,000 in gross receipts and, in the case of merchants having gross receipts of more than $400,000, gradually rose to one percent. Like the Ten Percent Tax, the Kentucky gross receipts tax was defended as "essentially a revenue measure." *Id.* at 555. Similarly, the trial court in

Stewart Dry Goods found what the court below effectively held here, to wit, that the greater a merchant's gross receipts were, the greater its profits were likely to be. *Id.* at 558.

Nevertheless, this Court found the Kentucky statute unconstitutional. Noting that it was "not concluded by the name or description of the tax as found in the act," *id.* at 555, the Court struck down the tax because, despite its characterization as a revenue measure, it bore no relation to the amount of profits realized by retail merchants. Quoting from its earlier opinion in *United States Glue Company v. Town of Oak Creek*, 247 U.S. 321, 328-29 (1918), the Court stated:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between the profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

294 U.S. at 558.

The Court then turned its attention to the argument that the difficulty of conditioning the amount of tax payable on the amount of profits realized justified imposing a tax arbitrarily on the basis of receipts. After noting that there could be no "finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance," *id.* at 559, the Court rejected the notion that considerations of convenience could justify the tax, stating:

> We are told that the gross sales tax in question is in truth a rough and ready method of taxing gains under the guise of taxing sales; that it is less complicated and more convenient of administration than an income tax; and Kentucky for these reasons is at liberty to choose this form, and to ignore the consequent inequalities of burden in the interest of ease of administration. The argument is in essence that it is difficult to be just, and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection.

Id. at 559-60. The Court then suggested that if Kentucky had truly wished to make its tax dependent on the magnitude of a merchant's business, it could have accomplished that goal by enacting an "income levy." *Id.* at 560. The Court concluded:

> The Kentucky statute ignores the form of organization and the method of conductng business. The taxable class is retail merchants, whether individuals, partnerships or corporations; those who sell in one store or many; those who offer but one sort of goods and those who through departments deal in many lines of merchandise. The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed. It exacts from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other. We hold the act unconstitutional, and reverse the judgment.

Id. at 565-66.

We submit that the Ten Percent Tax at issue here suffers from the same infirmities as the gross receipts tax at issue in *Stewart Dry Goods*. While the Ten Percent Tax was upheld by

the court below on the basis that the Legislature could justifiably have assumed that large real estate transactions are generally more profitable than small transactions, absolutely no proof was offered to justify this conclusion. In fact, the very example discussed by the majority in the court below shows that such an assumption, even if it had actually been made, would have been unfounded. As the court below stated (App. A., pages 3a-4a):

> [T]hey [plaintiffs] assert that by exempting transfers for less than one million dollars the . . . [Ten Percent Tax] treats identically situated taxpayers differently on the basis of varying levels of gross receipts, e.g., a taxpayer who sells his property for $999,999 and has a gain of $500,000 owes no tax whereas a taxpayer who sells his property for $1,000,001 and has a similar $500,000 gain must pay a tax of $50,000 . . . .

As in *Stewart Dry Goods*, therefore, no support was furnished, nor does any support exist, for the proposition that the Legislature, in enacting the Ten Percent Tax, made any attempt to accord similar treatment to taxpayers situated similarly. As the court below conceded, almost glibly, the taxpayer who realizes a $500,000 gain on a $999,999 transaction pays no tax while a taxpayer who realizes a $500,000 on a transaction in the amount of just *two dollars more* pays $50,000 in tax. A more blatant instance of unequal treatment of taxpayers who are similarly situated can scarcely be imagined.

It is also important to emphasize that in at least one respect the Ten Percent Tax is *more* arbitrary and discriminatory than the gross receipts tax found to be unconditional in *Stewart Dry Goods*. This is so because the tax at issue in *Stewart Dry Goods* was graduated; while a merchant having gross receipts of more than $400,000 was saddled with tax at a higher percentage rate than a merchant having gross receipts of less than $400,000, both merchants were subject to the same percentage tax rate on the first $400,000 of gross receipts.

Here, in contrast, the Ten Percent Tax does not apply at all to transfers for consideration of less than $1 million, but applies to transactions meeting the $1 million threshold from "dollar one." As discriminatory as the gross receipts tax at issue in *Stewart Dry Goods* was, therefore, the Ten Percent Tax is even more discriminatory.

In an effort to distinguish the Ten Percent Tax from the gross receipts tax found to be unconstitutional in *Stewart Dry Goods*, the appellee argued before the court below that (1) the Ten Percent Tax is, by its terms, a tax on gains as opposed to gross receipts; (2) a taxpayer owes no tax for a transfer of real property unless a gain is realized; (3) the amount of tax due on any gain is measured by the amount of the gain; and (4) the only exception to the rule is that transfers of real property for consideration of less than $1 million are not taxed at all.

We submit that appellee and the court below missed the mark. For one thing, the lesson of *Stewart Dry Goods* is not that gross receipts taxes are necessarily bad or that "gains" taxes are necessarily good; indeed, the Court began its discussion by noting that the label put on a tax by the legislature is not dispositive. 294 U.S. at 555. Rather, the lesson of *Stewart Dry Goods* is that the Constitution abhors labels such as "gains" taxes where, as here, they result in widely varying treatment of taxpayers situated similarly. Just as it was improper for the Kentucky legislature to enact a tax on the assumption that "generally speaking" merchants' profits increase as their receipts increase, so too it was improper for the New York Legislature to assume, in the face of uncontradicted proof to the contrary, "that 'generally speaking' profits increase as the amount of gross consideration received increases. . . ." (App. A., page 7a.) As appellants demonstrated, there was no basis for the Legislature to assume that profits ever increase with consideration, much less generally. Simply put, the Ten Percent Tax is, even under the rationales posited by the court below, arbitrary and discriminatory.

Appellee's characterization of the Ten Percent Tax as a tax on gains is disingenuous for other reasons as well. Thus, as the

dissent in the court below observed (App. A., pages 11a-12a), certain "soft costs" associated with the acquisition and sale of property are excluded from the definition of "original purchase price" contained in the statute (Tax Law § 1440(3); App. D, pages 23a-24a) and, therefore, are excluded from the determination of gain. Although the harshness of this exclusion has been ameliorated somewhat by regulation, "soft costs" related to selling real property, including costs incurred in advertising, public relations and marketing, and field office expenses, maintenance expenses, business taxes and warranty costs, still are excluded from the definition of "original purchase price." (App. A., page 12a.) An entire category of real and necessary costs, which plainly would serve to increase "original purchase price" and thereby reduce, or potentially eliminate entirely, a gain, is excluded from the calculation of gain. Therefore, even if the Court accepts appellee's attempt to distinguish the tax in *Stewart Dry Goods* from the Ten Percent Tax on the basis that the Ten Percent Tax applies to gains, it is clear that the Ten Percent Tax does not attach simply to gains but, rather, to the gross receipts of transfers, by virtue of the very expansive definition of "gain" enacted by the Legislature. We submit that the Legislature may not escape the effect of the principles articulated in *Stewart Dry Goods* simply by defining the elements entering into the calculation of "gain" so as to give the Ten Percent Tax the superficial appearance of validity.

The Ten Percent Tax is also arbitrary in that it applies to the sales, for less than $1 million, of condominiums and cooperatives in buildings where the aggregate consideration equals or exceeds $1 million, while exempting from the Tax analogous transactions involving subdivided parcels of land with improved residences thereon. Thus, for example, if a developer converted an apartment complex containing two hundred apartments to condominium ownership and sold each apartment for $50,000, he would be required to pay the Ten Percent Tax. If the same developer, however, subdivided a large estate tract in the same town into two hundred smaller lots, built houses on the lots and sold them for $50,000 each, he would pay no tax. Although either venture would result in considera-

tion to the developer in the sum of $10 million, the developer would be subject to the Ten Percent Tax if he sold two hundred apartments for $50,000 each and exempt from the Tax if he sold two hundred homes for the same price.[4] In distinguishing sales of condominiums and cooperatives from sales of subdivided parcels of realty with improved residences, therefore, the legislature has made an already arbitrary and discriminatory tax measure more arbitrary and discriminatory.

In short, the Ten Percent Tax is no more defensible as a rational and convenient method of taxing gains than was the gross receipts tax found to be unconstitutional in *Stewart Dry Goods*. As shown above, the Ten Percent Tax accords widely varying and disparate treatment to taxpayers who realize identical gains on their respective transfers of real property because the tax is applicable, if at all, only if the gross receipts of the transfer equal or exceed $1 million. Even where this threshhold is surpassed, moreover, the Ten Percent Tax attaches to gross receipts, and not merely to gain, because the "soft costs" incurred by the transferor, while real and necessary, may not be added to the transferor's basis and, therefore, result in a gain which does not truly reflect the amount of money left to a transferor after subtracting his costs from his receipts. Finally, the Ten Percent Tax discriminates against condominium and cooperative developers, because it requires that the selling prices of all the units within a building be aggregated for the purpose of determining whether the $1 million threshhold has been met, while not requiring any aggregation of the prices of

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4 While the court below offered four hypothetical bases to rationalize this distinction (App. A., page 8a), each basis offered has been negated by appellants. (*See* Jurisdictional Statement, pages 13-17.) We note, moreover, that while the majority attempted to rationalize the disparate treatment of taxpayers selling condominiums and cooperatives on the basis that the Legislature might have wished to protect rental tenants and individual homeowners of limited means (App. A., Page 8a), this "rationale" fails upon analysis. In the example discussed above, for instance, the developer would not be subject to the Ten Percent Tax even if, instead of selling the houses for $50,000 each, he sold them for $500,000 each.

subdivided parcels of real property with improved residences. Since the discriminatory effect of the Ten Percent Tax could have been mitigated, if not negated, by "enact[ing] a 10% capital gain surcharge on every taxable transfer of real property in the State" (App. D., page 10a), it is plain that the rationales offered by the majority in the court below to uphold the Ten Percent Tax—the assumption that profits increase with price and considerations of administrative convenience—were entirely unjustified. In these circumstances, we submit that the Ten Percent Tax violates the Equal Protection Clause of the Fourteenth Amendment and should, therefore, be set aside.

D. Subsequent Opinions Adopting *Stewart Dry Goods.*

There can be no doubt that the principles set down in *Stewart Dry Goods* remain valid, at both the state and federal level. This Court, for example, relied upon it during the following Term in striking down a similar gross receipts tax in *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U.S. 32 (1936). The principles articulated in *Stewart Dry Goods* have also been applied by several state courts. *See Merit Oil of New York, Inc. v. New York State Tax Commission*, 111 Misc. 2d 118, 443 N.Y.S.2d 604 (Sup. Ct. Albany Co. 1981); *Kalian v. Langton*, 96 R.I. 367, 192 A.2d 12 (1963); *Pabst v. Commissioner of Taxes*, 136 Vt. 126, 388 A.2d 1181, *appeal dismissed*, 439 U.S. 922 (1978). Indeed, while the *Stewart Dry Goods* opinion was rendered fifty years ago, its validity has never been questioned by this Court.

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In summary, the Ten Percent Tax is unconstitutional because its arbitrary $1 million threshhold has the effect of treating similarly situated taxpayers differently from one another and because the statutory definition of the elements considered in determining whether a gain has been realized on a given transfer result in the taxation of the gross receipts of a transfer. Since the rationales advanced by the court below in upholding the Ten Percent Tax are demonstrably incapable of withstand-

ing analysis, and inasmuch as the constitutionality of the Ten Percent Tax poses questions of enormous significance to the New York real estate industry, we submit that the Court should note probable jurisdiction and reverse the judgment below on the ground that the Ten Percent Tax violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For all the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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